89-1612

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

October Term, 1989

DARIUS IRBY, et al.,

Petitioners,

vs.

VIRGINIA STATE BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the standard of proof a State is required to meet to retain its school board appointment system which was held to be enacted for an invidious, racially discriminatory motive.

2. After a judicial finding that race was a substantial or motivating factor in the adoption of a State constitutional provision, may the articulation of race-neutral reasons, reasons not shown to be relied upon by the State, serve to meet the burden of proof required by Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1979), Hunter v. Underwood, 471 U.S. 222 (1985) and Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989).

3. Is the court of appeals' decision in conflict with prior decisions of this Court which hold that the consequences of an intentionally discriminatory system are presumed to be the result of that intent, and that intent is not required under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

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PARTIES

Petitioners-Plaintiffs: Darius Irby, John S. Neal, Charles W. White, Rev. James Samuel Williams, Jr., Cora Lee Tucker, Willie Powell, Milton Richardson, the Virginia Unit Of The Southern Christian Leadership Conference and Citizens For A Better America;

Respondents-Defendants: Susan H. Fitz-Hugh, Secretary of the Virginia State Board of Elections, the Virginia State Board of Elections, O. Paul Long, Roy C. Daniels, Everett Eppes, John L. Jenkins and Carol Hagaman, members of the School Board Selection Commission of Nottoway County; Eloise H. Powell, James R. King, JR. and G. Forest Ragland, members of the Electoral Board of Nottoway County; C. Hamilton Agee, Jr., Maury La Sueur and Nancy Morris, members of the School Board Selection Commission of Buckingham County;

Sam Wallace Shepard, Thomas N. Morgan and Thomas Joseph Sterger, members of the Electoral Board of Buckingham County; Hugh E. Carwile, Jr., Theresa A. Clark, James W. Garnett, Jr., William R. Hendley, Maurice H. Maxwell, Jr., James C. Moore, Marvin W. Scott and Chauncey Stokes, members of the Board of Supervisors of Prince Edward County; William E. Watson, S. Howard Ferguson, Jr. and Vanessa R. Venable, members of the Electoral Board of Prince Edward County; and Robert P. Lawler, Oscar B. Tate, Fulton C. Conner, Richard E. Abbott, Larry D. Clark, William E. Colman, Ruth S. Henderson and Huell W. Matthews, members of the Board of Supervisors of Halifax County; and Louis P. Woltz, Lucy A. Conner, and James W. Farrington, members of the Electoral Board of Halifax County; Florence S. Farley, M. Bruce Edwards, Garland L. Bigley, Charles H.

Cuthebert Annie M. Mickens, Richard H. West, Sr., and Joe R. East, Jr., members of the City County of the City of Petersburg; and Anne Aldridge, Rose King and Henry Clay Phillips, members of the Electoral Board of the City of Petersburg.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DARIUS IRBY, et al.,

Petitioners,

vs.

VIRGINIA STATE BOARD OF ELECTIONS, et al., etc.,

Respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as Irby v. Virginia State Board of Elections, 889 F.2d 1352. The findings of fact and conclusions of law of the district court are reported sub nom. Irby v. Fitz-Hugh, 693 F.Supp. 424 (E.D. Va. 1988), and the opinion of the district court on summary judgment is reported at 692 F.Supp. 610.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1989. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing in banc was entered on January 9, 1990.

This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The constitutional and statutory provisions are contained in the separately bound appendix to this petition. They are the first, thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States, Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and Chapter 591 of the Acts of Virginia of 1956, which repealed a provision allowing for the election of

school board members and prohibited such elections.

STATEMENT OF THE CASE

In 1901-02 Virginia held a Redeemer constitutional convention, the purpose being to restore white supremacy. This Court has found racial motivation in that convention. Harman v. Forsennius, 380 U.S. 528 (1965).

Plaintiffs, petitioners here, challenged the decision of that convention to reject a proposal to have elected school boards as being intended to prohibit black citizens from both serving on school boards and participating in the selection of school board members.[1] Both

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1. This action was brought by seven individual black citizens, residing in the City of Petersburg, and Nottoway, Buckingham, Prince Edward and Halifax Counties, together with two civil rights organizations. Defendants were the Secretary of

courts below determined that the decision of the Constitutional Convention of 1901-02, which rejected elected school boards in favor of an appointive system, was adopted with the intent to discriminate against black citizens. 6a, 140a. The record amply supports these findings.

The report of the education committee at that convention recommending elected school boards was explicitly rejected for racially discriminatory reasons. 7a. A member of the Committee on Education, J.B.T. Thornton, opposed the election of

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(Footnote 1 cont.)

the Virginia State Board of Elections and the Board, together with the members of local electoral boards and the bodies which appoint local school board members.

The jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1343(3), 1343(4) and 2201 and 42 U.S.C. § 1983.

school boards with the following argument:

> [I] shall vote against the report made by the committee for this reason... Although it is claimed that the white people control absolutely their local affairs throughout the State, it is a mistake, and if this report is adopted, as presented here, there are a number of counties in the State in which we will have negro trustees. That is a condition of affairs that is abhorrent... I believe we would be doing injustice to the white people of the State to undertake to place election of trustees in the hands of the people.

Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, 1901-02, 1829 (Richmond, 1906). 46a.

The result of the rejection of the proposal for elected school boards was that the convention left the method of school board selection to be determined by the legislature, and the legislature in 1903 opted to continue appointed school boards. That decision continues in force today.

The Methods of Appointment

Local school boards are appointed using one of two methods. The school board is either appointed by a three person school board selection commission, which in turn is appointed by the local circuit court judge, or by the local governing bodies--city and town councils and county supervisors.[2] The power of appointment rests in one of these two bodies, and there have never been elected school boards except for one decade in which Arlington County residents were allowed to elect their school board.

The Short-Lived Arlington Option

An act of the General Assembly in 1947, Acts, 1947, Chapter 61, permitted counties with a county manager which had

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2. Va. Code §§ 22.1-34, 15.1-609, 644, 708 and 770; 22.1-50 and 22-153.

abolished magisterial districts to elect their school boards. Only Arlington County qualified, and switched, at that time. 61a. When Arlington's school board voted to adopt a school desegregation proposal in 1956, the legislature abolished the elected board. The repeal was not limited to Arlington, but prescribed that "no school board shall be elected by popular vote in and for any county or city." Acts of Virginia, 1956, Chapter 591, 161a.

The district court found as fact that "the General Assembly abolished Arlington's elective system as part of a program of 'massive resistance' to court-ordered school desegregation." 119a. The court of appeals agreed that "the Virginia legislature clearly acted with a discriminatory purpose in passing the 1956 law

forbidding popularly elected school boards anywhere in the state." 14a-15a.

Thus the last time the full legislature of Virginia voted on a statute to have elected school boards, it returned to an all appointment system, and acted with an invidiously discriminatory motive. Although the state constitution was subsequently revised, the provision authorizing the legislature to choose the method of school board selection was not changed, and the legislature has never given serious consideration to elected school boards.

The Constitutional Revision Of 1971

Between 1968 and 1971, Virginia's constitution was revised. One of several purposes of the revision was to close the door on the era of massive resistance to school integration. A blue ribbon commission was appointed to propose changes in

the constitution, and although the members of the commission were aware of the 1901-02 convention debates on school board selection, there is no record that the commission considered school board selection, and it did not recommend any changes in the method of selection. At that time, the district found, there "were few blacks on Virginia's school boards..." 127a.

After the commission produced its recommendations, the legislature met as a convention, its debates recorded and transcribed. The method of school board selection was barely discussed, and the district court found as fact that the convention "simply could not agree on which method was best and put the debate off to another day by agreeing to preserve

the flexibility that currently existed." 123a.[3]

Other racial issues were debated in the 1971 revision process. Tuition grants to students attending private schools had their origin in massive resistance. But in the convention, non-discriminatory reasons for retention of tuition grants were debated, as were the discriminatory history of the grants and the language of the provision, Trial transcript, 44-48, 384, and tuition grants were put into the new constitution. In contrast, "the school board selection provision...was retained without change and with virtually no debate." 17a.

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3. The district court granted plaintiffs' motion in limine to prohibit the introduction of testimony by legislators of after the fact explanations or interpretations of the legislative history. 94a-101a.

Since the constitutional revision of 1971, which retained the authority of the legislature to prescribe the method of school board selection, there have been some statutory modifications in how appointments are made, 123a, but all bills proposing elective boards failed. Between 1971 and 1988 there were 48 bills introduced to change to elected school boards; most were killed in committee and none were voted on by the full legislature. 125a, Trial Transcript 126.

In 1984, a legislative subcommittee filed a study report which "discuss[ed] the arguments for and against the appointment of members of the school board." 126a. The district court found that "[t]he report presents legitimate, non-racial reasons for appointing school board members..." 126a, 17a. The court of appeals noted, however, that the "sub-

committee report took no stance on the issue but reported the various arguments for and against electing school boards." 10a.

There was no evidence that the legislature relied upon this listing in killing the numerous proposals to elect school boards. 18a, n. 2. Nor did the subcommittee study the racial history and effect of school board appointments. The chairman of the house subcommittee which produced the 1984 study report testified that race "was never an issue, never brought to our committee that the manner in which we were presently operating..., was never an issue, that race was not an issue in our state." Trial deposition of Ford Quillen, 34.

The Racial Effects

Plaintiffs' complaint is that the 1901-02 constitutional provision was

intended to prohibit blacks both from serving on school boards and from choosing those who serve, and continues to have the intended result.

Although the number of blacks serving on school boards across the state matches their numbers in the statewide population --approximately 18 percent, 27a--the evidence is undisputed that (1) there are a number of local jurisdictions in which blacks are underrepresented on school boards; (2) the local appointing bodies remain overwhelmingly white; and (3) black citizens are still denied the right to vote for members of school boards.

Blacks are underrepresented by at least one seat in 26 counties and four cities. Plaintiffs' Exhibits 3 and 4. Blacks are underrepresented in 20 of the 40 jurisdictions with a black population exceeding 30%. Plaintiffs' Exhibit 8. In

six counties where blacks make up between 30 and 48% of the population, blacks are underrepresented by two members. Plaintiffs' Exhibit 1. There are no black members on 50 of the 136 local school boards. Plaintiffs' Exhibit 2. Forty-five of Virginia's 95 counties appoint school boards by selection commission. In every one of those 45 counties a white circuit judge still appoints the selection commission.

Buckingham County is an example of how the appointment system works to limit black participation on school boards and in the appointing authority. The parties stipulated that since 1971, every black "who has formally requested appointment by the Buckingham County School Trustee Electoral Board to the Buckingham County School Board has been appointed." Stipulation of June 28, 1988. Buckingham is a

42% black county, and since 1971 there has always been one, but never more, black on the seven member school board. And the appointing commission "is composed of and has always been composed of only white members. Ibid.

There is continuing overt racial discrimination in the appointment of school boards. In Pittsylvania County, a 53 year old black school board applicant was asked "whose boy are you," and since he was a member of the NAACP, was asked what he would do "if the NAACP came in and decided to close the school?" T. 171-72. In Southampton County, which is 48% black, the commission appointed a white woman whose children had attended an all white academy to the school board over a black woman supported by a black county supervisor. T. 179-80. Henrico County, an urban county adjacent to Richmond with

a 20% black population, has never had a black school board member on its five person board. In 1988, a concerted effort by the black community to have a black appointed resulted in four new members--all white--being appointed. T. 192-93.

Virginia did not contest the existence of recent overt racial acts in the appointment of school board members. It argued that "those were personal acts of discrimination and disparaging remarks which are abhorrent to right-thinking Virginians..." T. 442.

The Holdings

The district court found that "[r]ace was a 'substantial' or 'motivating' factor, Hunter v. Underwood, 471 U.S. 222, 228 (1985), behind the 1901-02 Constitutional Convention's decision to retain an appointive system," 140a, a finding affirmed by the court of appeals. 14a.

Similarly, the 1956 repeal of Arlington's elected school board was found to be racially motivated. 143a, 14a.

The district court's conclusion on the 1971 constitutional revision and the subsequent failure of legislation proposing elected school boards was that "[t]he state has carried its burden of proof in demonstrating that at least since 1971 the system has not been maintained for racially discriminatory reasons...." 145a. The district court noted that "[t]he 1984 legislative study also presents legitimate non-discriminatory reasons for preserving appointive boards." 145a.

The court of appeals, while not agreeing that the silent 1971 legislative record met the state's burden, held that the reliance on the 1984 study report was "a much more persuasive piece of evidence

in finding that the defendants had met their burden of rebutting the inference of discriminatory intent." 17a. Though it acknowledged that the study report "took no stance on the issue," 10a, and criticized the district court for not investigating "the legislative debate over the various bills to determine whether supporters of appointed school boards articulated the arguments found in the 1984 study," 18a, n. 2, the court of appeals held the report sufficient to rebut "the inference of discriminatory intent." 17a.

Having concluded that the direct evidence (and findings) of intent had been in effect negated, both courts examined the racial effects from the perspective of inferring intent to discriminate. 148a, 27a-33a. Although the evidence of black underrepresentation on school boards and of exclusion from the power of appointment

was undisputed, 83a, 130a-131a, the district court held there was no proof "that the appointive sytem is responsible for this disparity," 148a, or "that the appointive system hinders" blacks in gaining appointments. 150a.

The court of appeals agreed that plaintiffs were required to prove the system caused the effects and had not done so. The court of appeals ruled, inter alia, that plaintiffs did not show "a causal link between the appointive system and black underrepresentation...." 31a. It also ruled that white control of the appointive process did not demonstrate a discriminatory impact. It ruled that a complaint about appointments being made by white elected officials could only be addressed by a direct Voting Rights Act challenge to their electoral schemes. 32a. As for the appointment of selection

commissions by white judges, the court of appeals ruled that "[a]s for the fact that white judges are ultimately, though indirectly, responsible for selection of school board members...," plaintiffs would be required to produce evidence of racial discrimination in the selection of those judges. 32a-33a. (Emphasis in original.)

Accordingly, both courts concluded there was no racially discriminatory impact of the appointive process, and rejected the fourteenth amendment, fifteenth amendment and Section 2 of the Voting Rights Act claims.

Prior to trial the district court had granted summary judgment on plaintiffs' first and thirteenth amendment claims, 52a-53a, and the court of appeals affirmed. 34a.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the court of appeals permitting the continuance of an intentionally discriminatory system is in conflict with prior decisions of this Court.

A. Virginia's Constitutional Provision Having Been Adopted in 1901-02 For Racially Discriminatory Reasons, With No Constitutionally Permissible Reason Being Present, Such Provision is Unenforceable Under the Constitution.

The discriminatory intent of the constitutional convention of 1901-02 in rejecting elected school boards has not been in issue in this case.

Virginia did not contest the proof of racial motive in the 1901-02 convention, but merely argued that it was irrelevant. In the court of appeals, Virginia conceded that "plaintiffs were able to prove [] that at one point 87 years ago, the appointive system was maintained, at least in part, for an improper purpose."

Brief of Appellees, U.S. Court of Appeals for the Fourth Circuit, No. 88-2919, p. 30. Both courts below found the 1901-02 convention rejected elected school boards for racial reasons. Supra, 16.[4]

Unlike Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), this is not a situation of mixed motivations, some legitimate and some not. Both parties

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4. The only evidence of another motivation for this decision in the convention record was that the delegates also intended to discriminate against poor whites. 116a. The district court held that "[t]he intent...was to reduce poor whites and blacks to the status of women--disenfranchised." Ibid. Whether or not an intent to discriminate against poor whites could salvage the provision, cf., Hunter v. Underwood, 471 U.S. 222, 231-32 (1985), the State was unable to establish the convention delegates would have acted solely against poor whites. Even defendants' expert witness, Dr. Peter Stewart, who advanced the economic discrimination defense, conceded that the effect on poor whites did not alter the intent to discriminate against blacks. Trial Transcript, 246-48.

examined the historical record and found only illegitimate motives for the decision to have appointed school boards. The provision, intended to discriminate against black citizens by excluding them from service on school boards and in having a voice in who serves on school boards, is invalid under the thirteenth, fourteenth, and fifteenth amendments and Section 2 of the Voting Rights Act.

Since that is the system in place, judgment should have been entered invalidating the provision. Instead, the courts below held constitutional this provision which they found to be adopted for invidiously discriminatory reasons. That is contrary to City of Richmond v. United States, 422 U.S. 358, 378 (1975) ("An official action...taken for the purpose of discriminating against Negroes on account of their race has no legitimacy

at all under our Constitution...") The validation of such discriminatory action is a decision of national importance and merits review by this Court.

B. Having Found Intent to Discriminate, the Courts Below Should Have Followed Prior Decisions of this Court and Required Respondents to Prove by a Preponderance of the Evidence that The System Would Be in Place Even in the Absence of the Discriminatory Motivation.

Plaintiffs have argued in Point A that the record of the 1901-02 convention revealed no legitimate motivation. But if Virginia is allowed to justify the decision by subsequent motivations, then Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), is the standard it must meet.

Once invidious discriminatory intent has been proved, this Court has required that the burden of proof shift to those who defend a decision to prove by a preponderance of the evidence that the

same decision would have been made even in the absence of the illicit motive. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989).

Neither court below shifted the burden of proof. Instead, both concluded merely that there was no proof of racial motivation after 1971. That is not the equivalent of proving by a preponderance of the evidence that the system would be in place absent the prior illicit motivation.

The court of appeals did not discuss Mt. Healthy. It held, "We need not decide whether the Equal Protection Clause mandates the burden-shifting scheme proposed by the plaintiffs because, even assuming that the burden shifted to the defendants, they have proved that racial discrimina-

tion no longer motivates Virginia's decision..." 14a.[5] Thus the standard the court required of Virginia was to prove there was no new intent.

The courts found "smoking gun" racial motivation first in 1901-02 and again in 1956. 14a. Given that intent, Mt. Healthy requires that the state show by a preponderance of evidence that the system would be in place even absent the illicit motive.

There was no such evidence.

At no time since 1901-02 has the state reconsidered its school board appointment system and (1) considered the

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5. The court of appeals characterized plaintiffs' "scheme" as shifting "the burden to the defendants to prove that the system is not currently being maintained for discriminatory purposes." 13a. With due respect, that is not the standard plaintiffs proposed. The correct standard is that outlined in Mt. Healthy.

prior racial motivation and the existing effects at the time of the reconsideration, (2) weighed those against race neutral considerations, and (3) decided that in spite of the prior racial purpose and current effects that it desired to continue the appointive system for such race neutral reasons.[6] That, at a minimum, is what is required by Mt. Healthy.

Not only did the courts below fail to require Virginia to meet this burden, but on a more fundamental level, Virginia has never purged the conceded racial discrimination of its appointed school board system. It has never repealed its

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6. Compare the 1971 convention debates on tuition grants, a formerly discriminatory device debated and retained for race neutral reasons. Virginia failed to make a similar record on school board selection.

discriminatory provisions and re-enacted the same system. Compare, Hunter v. Underwood, 471 U.S. 222 (1985). It has never purged its discriminatory effects. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 438 (1968)(affirmative duty to eliminate discrimination "root and branch").

The last time the full legislature voted on whether or nor to have elected school boards, it repealed the Arlington option, a decision found to racially motivated.

There has been no serious consideration of elected school boards subsequent to 1970.[7] Trial Transcript,

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7. In 1968, a bill which would have provided local options for elected school boards was killed by a leader of massive resistance. Trial Transcript, 38-9. That delegate made his views on racial harmony known during the 1969 convention debates on the education articles:

126. Bills proposing electing boards are primarily killed in committee. Plaintiffs put on evidence of the obvious; it is easier to kill bills than to change the status quo. Ibid., 125. Supporters of appointed school boards have the advantage of the status quo, an advantage that exists because of illicit motive.

The 1984 study report serves as a listing of arguments for and against electing school boards, but, as the court

(Foonote 7 cont.)

> Black Sambo has been withdrawn from the [library] list, the story that did more than anything to bring white and colored children to play together and to love each other. Black Sambo has been taken out of the library. Old Black Joe--they just do not think [sic: sing] that any more.

Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution (Ex. Sess. 1969, Reg. Sess. 1970), 299 (Mar. 28, 1969), Trial Transcript, 56.

of appeals found, there is no evidence that this list has been relied on in legislation. The existence of possible legitimate reasons for maintaining the appointive system is not the equivalent of proving by a preponderance of the evidence that these are the reasons on which Virginia relied. And the racial impact of the system was not studied by that 1984 subcommittee. Supra, 12.

In short, Virginia did not offer any evidence to carry its burden under Mt. Healthy. Virginia has never purged the conceded racial intent. The opinion of the court of appeals that the evidence of no new overt racial motivation and the mere articulation of race neutral reasons, not shown to be relied on by the state, are sufficient to validate a state action found to be racially motivated merits review by this Court.

II.

The opinion of the court of appeals which refused to presume that racial effects following an intentionally discriminatory act are caused by that act conflicts with prior decisions of this Court and with Dowell v. Board of Education of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989), and raises unresolved issues regarding dismantling discriminatory systems.

A. The Courts Below Failed to Apply Prior Decisions of this Court By Requiring Proof That The Discretionary Appointment System Compelled the Discriminatory Results.

This Court recently granted review on the issue of whether a school system, once determined to be intentionally discriminatory, should have its subsequent actions scrutinized merely for lack of intent or whether it has the burden of proving disparate results are not caused by the prior discrimination. Board of Ed. of Oklahoma City Public Schools v. Dowell, cert. granted 58 U.S.L.W. 3614 (U.S. Mar. 26, 1990)(No. 89-1080), reported below sub

nom. Dowell v. Board of Ed. of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989). The court of appeals for the fourth ciruit reviewed current effects of Virginia's appointive system as if prior discriminatory intent had not been judicially determined.

Having shown racial motive, the most plaintiffs were required to show was the existence of racial results. The courts below analyzed the results in terms of whether or not they were sufficient to infer intent. They required that plaintiffs prove that the appointive system is responsible for the disparities, supra, 19, and that the overwhelmingly white composition of the appointing bodies was the product of independent discrimination, despite this being precisely what was intended by the members of the 1901-02

convention.[8]

Once intent is shown, this Court has held there is a presumption that current effects are the result of past intentional discrimination. See, Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 211 (1973) ("Thus, if respondent...cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition..."); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 26

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8. So, for example, the court demanded proof as to why all of the judges who appoint selection commissions are white. Whether black judges could be appointed who would then frustrate the intent, that situation has never existed, nor would it purge the intent. Giles v. Harris, 189 U.S. 475, 23 S.Ct. 639, 642 (1903)("it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent").

(1971)(system with history of discrimination has burden of showing current actions are genuinely nondiscriminatory). When state law provisions are intended to place unfettered discretion in the hands of white officials to discriminate, and discrimination follows, this Court has never required proof that state law compelled the discrimination. Cf. Ex parte Virginia, 100 U.S. 303 (1881); Alexander v. Louisiana, 405 U.S. 625 (1972). Davis v. Schnell, 81 S.Supp. 872 (S.D.Ala.), aff'd per curiam, 336 U.S. 933 (1949).

Virginia's system was intended to provide discretion in the appointment process, with the hope and expectation that this discretion would be used to bar blacks from participation. When a 53 year old black man sought appointment and was asked, "whose boy are you," Trial Tran-

script, 171, the selection commission member who asked that question was not compelled to act in a racist manner. But he acted just as the 1901 convention members hoped and expected he would.

The court of appeals' holding that racial effects must be compelled by the appointive system was, in effect, requiring effects sufficient to infer intent. This is inconsistent with prior decisions of this Court on burdens of proof after intent has been found, and, particularly in light of Dowell, presents an issue of national importance.

B. The Court of Appeals' Intepretation of Section 2 of the Voting Rights Act Conflicts with the Act and with This Court's Opinion in Thornburg v. Gingles, 478 U.S. 30 (1986).

Section 2 prohibits intentional discrimination in voting legislation, S.Rep. No. 97-417, 97th Cong., 2d Sess. 27 (1982). Chapter 591, Acts of Virginia,

1956, prohibited elected school boards. 161a. The court of appeals found "the Virginia legislature clearly acted with a discriminatory purpose in passing the 1956 law forbidding popularly elected school boards anywhere in Virginia." 14a-15a. Nonetheless, it refused to invalidate that statute under Section 2. The legislative history of Section 2 strongly suggests that once intent is shown, the act should be invalidated. The Senate Report, ibid., 27, n. 108, by citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), for the analysis of intent, and not citing Mt. Healthy, decided the same day, indicates Congress' belief that a finding of intent ended the inquiry.

Beyond the evidence of overt intent, the court of appeals requirement that plaintiffs prove that the discriminatory

results were compelled by the selection system was, in effect, another way of requiring circumstantial proof of intent under Section 2. This conflicts with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as interpreted by this Court in Thornburg v. Gingles, 478 U.S. 30, 73 (1986).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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89-1612

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SPANIOL JR.
CLERK

NO.

IN THE

Supreme Court of the United States

October Term, 1989

DARIUS IRBY, et al.,

Petitioners,

vs.

VIRGINIA STATE BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION

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No. 88-2919.

United States Court of Appeals,
Fourth Circuit.

Darius IRBY; John S. Neal;
Charles W. White;
James Samuel Williams, Jr.
Cora Lee Tucker;
Willie Powell;
Milton Richardson;
the Virginia Unit of
The Southern Christian Leadership
Conference; Citizens for a
Better America, Plaintiffs-Appellants.

v.

VIRGINIA STATE BOARD OF ELECTIONS
et al., Defendants-Appellees,

and

Robert P. Lawler, in his official
capacity as a member of the Board
of Supervisors of Halifax County,
Defendant.

Argued June 8, 1989.
Decided Nov. 24, 1989.
Rehearing and Rehearing In Banc
Denied Jan. 9, 1990

Before PHILLIPS, MURNAGHAN, and WILKINSON, Circuit Judges.

MURNAGHAN, Circuit Judge:

A number of black residents and two civil rights organizations brought an action challenging Virginia's method of local school board selection as violating the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 et seq. of the Voting Rights Act of 1965, 42 U.S.C. Section 1973 et seq. Virginia law requires appointment, rather than election, of local school board members. The plaintiffs allege that Virginia adopted and maintained the appointment system with the intent to discriminate against blacks, and that the system currently has a discriminatory effect. The district court refused plaintiffs' request for class certification.

The district court granted summary judgment for the defendants on the First and Thirteenth Amendment claims, as well as that portion of the Fourteenth Amendment claim that relied on the Due Process Clause. 692 F.Supp. 610. A trial proceeded on the equal protection, Fifteenth Amendment and Voting Rights Act claims.

After trial, the district judge found for the defendants on all remaining claims. The plaintiffs appealed.

I.

The case was brought by seven individual black citizens who reside in the City of Petersburg or in the counties of Nottoway, Buckingham, Prince Edward or Halifax, and by two organizations Citizens for a Better America and the Virginia Unit of the Southern Christian Leadership Conference. The suit named

three sets of defendants: (1) members of the appointing bodies for local school boards in Petersburg and the four Virginia counties named above; (2) members of the Electoral Boards of each of those five jurisdictions; and (3) Susan H. Fitz-Hugh, Secretary of the State Board of Elections.

The method of appointing school board members varies widely among Virginia's counties and cities. In Nottoway and Buckingham counties, a three-person selection commission, whose members are chosen by a local circuit court judge, appoint the school board members. The county Board of Supervisors appoints school board members in Prince Edward and Halifax counties. The City Council selects Petersburg's school

board members.1/

The appointive system for selection of school board members in Virginia dates to 1870, when the state legislature passed a law providing for appointment of local school trustees by the state Board of Education. The trustees performed functions similar to those of present-day school boards. The district court found no evidence "that the original decision to make school boards appointive rather than elective was motivated by racial discrimination." Irby v. Fitz-Hugh, 693 F.Supp. 424, 427 (E.D.Va. 1988). The court also found conflicting evidence as to whether discriminatory intent motivated various modifications in the ap-

---

1 In some Virginia jurisdictions, none of which are defendants here, the county board of supervisors and the city council jointly appoint the school board where the school district overlaps the city and county boundaries. Va.Code section 22.1-53.

pointive scheme between 1870 and the turn of the century. Id.

However, discriminatory intent did figure prominently in Virginia's decision to retain the appointive system during the Virginia constitutional Convention of 1901-02. That convention drafted a new constitution that the state concedes was designed, in part, to disenfranchise blacks. During the convention, the state education commission proposed adopting a system of electing school board members. The convention rejected the proposal, however, after several delegates warned that such a change could lead to selection of blacks for school boards. The district court found that:

> [r]ace was a 'substantial' or 'motivating' factor ... behind the 1901-02 Constitutional Convention's decision to retain an appointive system. Several members of the Convention cast the decision in racial tones, and the plain

> purpose of the Convention was to disenfranchise as many impoverished people, including most blacks, as the delegates could .... The appointive system was maintained, therefore[,] for constitutionally impermissible reasons in 1902.

Irby, 693 F.Supp. at 432 (citations omitted).

The state legislature made some modifications to the appointive system in 1903. In the 1920s and 1930s, it rejected various recommendations to adopt an elective system for local school boards. The district court found no racial motivation in those decisions. Id. at 433.

In 1947, the General Assembly departed from the purely appointive scheme by passing a law permitting "any county operating under the county manager plan ... and in which county magisterial districts have been abolished" to hold

popular elections to fill school board positions. Id. at 428. At the time, only Arlington County had a form of government allowing it to qualify for the election option. Arlington County voters approved the changes and elected a school board.

The elective system continued in Arlington County until 1956, when the County school board agreed to desegregate its school system in compliance with Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The state legislature, in an effort "to impede Arlington's ability to comply with court-ordered desegregation," Irby, 693 F.Supp. at 433, repealed the 1947 law that had allowed elected school boards. The new law proclaimed that "no school board shall be elected by popular vote in and for any county or city." Id. at 428.

Between 1968 and 1971, Virginia considered changes in its constitution. The plaintiffs concede that one of the purposes for the constitutional revision "was to close the door on the era of massive resistance to school integration." Virginia established a Constitutional Revision Commission in 1968 to recommend changes to the 1902 Constitution. The commission made no recommendation for changing the school board selection method. The district court found that debates leading to adoption of the new constitution showed "no evidence that the means of selecting school boards was tainted by racial considerations." Irby, 693 F.Supp. at 429. The court further found that legislators "simply could not agree on which method was the best and put the debate off to another day by agreeing to preserve the flexibi-

lity that currently existed." Id. The district court never pointed to specific details of those debates to show what arguments legislators made in support of the appointive system.

The state legislature considered the school board selection process again in 1984 by commissioning a study to decide whether school board members should be popularly elected. The 1984 subcommittee report took no stance on the issue but reported the various arguments for and against electing school boards. Many of the arguments arose at public hearings that the subcommittee held throughout the state. The arguments in favor of appointed school boards included:

(1) insulating school governance matters from direct political pressures;

(2) promoting stable school board membership;

(3) encouraging the service of individuals who would not seek elective office;

(4) promoting diversity in viewpoints which otherwise may not achieve representation on an elected school board;

(5) avoiding the division of fiscal authority among multiple elected bodies;

(6) avoiding the fragmentation of local political authority; and

(7) avoiding the problem of single issue campaigns which freguently occur with elected school boards.

Since issuance of the study in 1984, the Virginia legislature has considered various bills to allow popular election of school board members. Irby, 693 F.Supp. at 429, n.1. It is unclear, however, to what extent legislators discussed or considered the findings of the

1984 study in rejecting those bills.

Turning to the issue of black participation on school boards, the district court found that the percentage of school board seats in Virginia held by blacks increased from 12% in 1974 and 1981 to 15.9% in 1985 and to 18% in 1986 and 1987. Irby, 693 F.Supp. at 430. The court also found that blacks comprised 18% of the voting age population in Virginia. Id.

However, all five jurisdictions at issue in the present case reported a smaller black representation on their school boards than in their population as a whole. The district court found the following disparities in 1987:

	General Population	School Board
Buckingham	42% black	14.2% black
Halifax	40% "	22.2% "
Nottoway	37% "	20% "
Prince Edward	37% "	25% "
City of Petersburg	61% "	44.4% "

Irby, 693 F.Supp. at 430.

II.

To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect. Crawford v. Board of Education, 458 U.S. 527, 544, 102 S.Ct. 3211, 3221, 73 L.Ed.2d 948 (1982); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The plaintiffs argue that once they prove the state adopted or maintained the appointive system in the past for discriminatory reasons, the burden then shifts to the defendants to prove that the system is not currently being maintained for discriminatory purposes. We need not decide whether the Equal Protection Clause

mandates the burden-shifting scheme proposed by the plaintiffs because, even assuming that the burden shifted to the defendants, they have proved that racial discrimination no longer motivates Virginia's decision to retain an appointive system for selecting school board members.

The plaintiffs satisfied their initial burden of proving that Virginia maintained the appointive system for purposes of minimizing or precluding black participation on school boards. The district court expressly found that the Constitutional Convention of 1901-02 retained the appointive system for racially discriminatory reasons. Irby, 693 F.Supp. at 432. Moreover, the Virginia legislature clearly acted with a discriminatory purpose in passing the 1956 law forbidding popularly elected

school boards anywhere in the state. As the district court found, the state legislature passed the law to impede one school district's willingness to comply with the desegregation mandate of Brown v. Board of Education. Irby, 693 F.Supp. at 428.

The defendants, however, have proved that the state does not currently maintain the system of appointed school boards for discriminatory reasons. The district court held that the defendants had carried that burden by "demonstrating that at least since 1971 the system has not been maintained for racially discriminatory reasons." Id. at 433. Specifically, the district court found such proof in the 1971 revision of the state constitution. In the atmosphere of the United States, which has had to suffer the complexities of a massive Civil War,

reconstruction, Plessy v. Ferguson, massive resistance, and Brown v. Board of Education, it is understandable that there is abroad a skepticism that the 1971 constitutional revision represented sufficient proof that Virginia had purged the discriminatory intent originally underlying the appointive system for school boards. Although all parties agree that a major purpose of the revision was to break with the massive resistance policies of the past, the 1971 redrafting of the constitution did not involve any alterations of the school board selection process and apparently no debate over the relative merits of appointed and elected school boards. Although the 1971 constitution wrought dramatic (and racially progressive) changes in other areas pertaining to education, one cannot readily assume that

such breaks with the past carried over to the school board selection provision which was retained without change and with virtually no debate.

Nonetheless, the district court also relied on a much more persuasive piece of evidence in finding that the defendants had met their burden of rebutting the inference of discriminatory intent. The court pointed to the 1984 study commissioned by the state legislature to evaluate the pros and cons of elected and appointed school boards. That study clearly set forth solely legitimate reasons for choosing an appointed school board over a popularly elected body. The evidence also showed that the state legislature subsequently considered bills that would have changed the law to allow elected school boards. The district court did not clearly err in

finding such evidence sufficient to demonstrate a lack of discriminatory intent in the current maintenance of the appointive system.2/ Accordingly, the plaintiffs' equal protection claim must fail.

III.

The Supreme Court has emphasized that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." Mobile v. Bolden, 446 U.S. 55, 62, 100 S.Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion). Accord, Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981). Since the

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2 The district court's findings would be more convincing had it investigated the legislative debate over the various bills to determine whether supporters of appointed school boards articulated the arguments found in the 1984 study. Nonetheless, the district court's failure to discuss the content of the legislative debates after 1984 does not necessitate reversing its factual findings as clearly erroneous.

defendants proved the absence of discriminatory intent in the current maintenance of the appointive system for school boards, the plaintiffs cannot establish a Fifteenth Amendment violation.

IV.

Plaintiffs purport to assert a due process claim under the Fourteenth Amendment. However, they raise no arguments in support of the claim other than those asserted under their equal protection claim. In reality, their claim is one alleging a violation of equal protection rather than of due process. The district court properly dismissed the plaintiffs' Fourteenth Amendment Due Process claim.

V.

Plaintiffs' voting rights claim presents a closer question, if the

question is properly before us at all. Whereas a plaintiff must prove discriminatory intent to succeed on a claim under the Equal Protection Clause or the Fifteenth Amendment, a showing of discriminatory effect may suffice to establish a violation of Section 2 of the Voting Rights Act of 1965. See Thornburg v. Gingles, 478 U.S. 30, 35, 106 S.Ct. 2752, 2758, 92 L.Ed.2d 25 (1986), citing S.Rep. No. 97-417, p. 28 (1982).

At the outset, we have considerable doubt as to whether Virginia's choice of an appointive system over an elective scheme for selecting school board members even implicates Section 2 of the Voting Rights Act. The defendants argue that Section 2 applies only where the state decides to choose officials through an election. The language of Section 2 offers some support for the defendants'

position:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. Section 1973(b) (emphasis added). The defendants argue that where no one, black or white, has the right to participate in a popular election of school board members, Section 2 is inapplicable. The few courts that have addressed the issue have found Section 2 inapplicable to appointive offices. Searcy v. Williams, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981) (school board), aff'd without op. sub nom. Hightower v. Searcy, 455 U.S. 984, 102 S.Ct. 1605, 71

L.Ed.2d 844 (1982); Williams v. State Board of Elections, 696 F.Supp. 1563, 1568-69 (N.D. Ill. 1988) (state circuit judges). See also Dillard v. Crenshaw County, 831 F.2d 246, 251 n. 12 (11th Cir. 1987).

Nonetheless, we will refrain from holding Section 2 inapplicable here because of the ambiguity of congressional intent. In such a circumstance as the present one, concluding, as we do, that, even if applicable, Section 2 has not been violated, we are reluctant to rush to decision that it does not apply when decision is not required and a situation similar to but not identical with what is here presented may arise in a subsequent case. The situation is one calling for us to eschew dictum although, seen in the light of the instant case, it appears more probable than not that Section 2 is

not applicable to appointive offices. Congress clearly believed that the choice between an elective and an appointive scheme implicated Section 5 of the voting Rights Act, 42 U.S.C. Section 1973c, which requires certain jurisdictions in the United States to obtain "preclearance" of proposed changes in procedures or requirements that could affect voting rights. See S.Rep. 97-417 at 6-7, reprinted in 1982 U.S. Code Cong. & Admin. News 183; Perkins v. Matthews, 400 U.S. 379, 389-90 n. 8, 91 S.Ct. 431, 437 n. 8, 27 L.Ed.2d 476 (1971); Robinson v. Alabama State Dep't of Education, 652 F.Supp. 484, 485 (M.D.Ala. 1987); County Council v. United States, 596 F.Supp. 35, 38 (D.D.C. 1984). In addition, Congress recently expressed concern about shifts from appointive to elective systems in discussing the 1982 amendments to the

Voting Rights Act, but failed to make clear whether such shifts implicated only Section 5 of the Act or Section 2 as well. See H.Rep. 97-227, 97 Cong. 2d Sess. 18 (1982) (discussing "discriminatory elements of the elections process such as at-large elections, high fees and bonding requirements, shifts from elective to appointive office...." (emphasis added)).

Congress did not necessarily intend that acts covered by Section 5 would also implicate section 2. Section 5 covers only certain jurisdictions in the country, those which congress has found to have the worst record of voting discrimination. See S.Rep. 97-417 at 15, reprinted in 1982 U.S. Code Cong. & Admin. News 192. Congress might have wished to keep a closer eye on those states than on jurisdictions with a more benign history

in voting matters. We have some doubts as to whether Congress intended the scope of Section 2 to extend so broadly as to encompass a state's choice between an elective and an appointive system for filling a given office, even when that choice was made years before enactment of the Voting Rights Act. Extending Section 2 that far could have dramatic and far-reaching effects.

We leave open the question whether Section 2's reach extends so broadly. Even if Section 2 applied here, the plaintiffs have failed to prove that the appointive system for school boards has produced discriminatory results. The plaintiffs argue that they have shown two types of discriminatory effects: (1) blacks are underrepresented on school boards in relation to their numbers in the general population, and (2) blacks

are underrepresented in the offices or governing bodies that ultimately appoint school board members. However, we conclude that the district court did not clearly err in finding that the appointive system did not create discriminatory effects insofar as the representation of blacks on school boards is concerned. Moreover, insofar as the plaintiffs challenge the racial composition of the officials who appoint school board members, they seek relief that far exceeds the scope of this lawsuit, which focuses on the selection of school boards rather than on the manner of choosing the selecting officials.

First, we examine the alleged underrepresentation of blacks on school boards. Clearly, no disparity exists on a statewide basis. The district court found that in Virginia as a whole,

"blacks comprised approximately 18% of the voting population and approximately 18% of all school board members statewide." Irby, 693 F.Supp. at 433-34. However, we believe the proper comparison must focus not on the statewide averages, but rather on the figures for the five local jurisdictions at issue in this appeal: Buckingham, Halifax, Nottoway, and Prince Edward counties and the City of Petersburg.

Although the district court found a "significant disparity" in Buckingham and Halifax counties between the percentage of blacks in the population and the racial composition of the school boards, the court found no proof that the appointive process caused the disparity. Irby, 693 F.Supp. at 434. The court's findings on this point are not clearly erroneous. The evidence showed that

"although blacks comprise a large portion of the population, they are not seeking school board seats in numbers consistent with their percentage of the population." Id. For example, since late 1971 every black individual who formally requested appointment to the Buckingham County School Board was placed on the board. In Halifax County, the evidence showed at least one instance where a black individual was nominated for the school board but voluntarily withdrew before appointment.

In the other three jurisdictions, the district court discounted the significance of the disparities between the percentage of the population that was black and the percentage of school board seats held by black individuals. In Nottoway and Prince Edward counties, the addition of one extra black on each

school board would cure the disparity. Most, though not all, of the statistical disparity would vanish in Petersburg if one more black were appointed to the school board. The wide statistical swing produced by the addition of a single black school board member in each of the three jurisdictions raises serious doubts as to whether the disparities are statistically significant. The defendants produced expert testimony discounting the statistical significance of the figures in the defendant jurisdictions. Moreover, the Supreme court has recognized the dangers of drawing conclusions from statistics involving boards with relatively few members. See Mayor of Philadelphia v. Educational Equality League, 415, U.S. 605, 611, 94 S.Ct. 1323, 1328-29, 39 L.Ed.2d 630 (1974) (upholding district court finding that there was no

significance in the differences between the percentage of blacks on a board and the percentage of blacks in the city's population; "the number of positions on the Panel was too small to provide a reliable sample; the addition or subtraction of a single Negro meant an 8% change in racial composition."). The panel at issue in Educational Equality League had 13 members. Id. None of the school boards at issue in the present case has more than nine members; one has only five members.

In sum, the district court did not clearly err in finding that the appointive system did not produce discriminatory effects insofar as black representation on school boards was concerned. The evidence cast considerable doubt on the existence of a causal link between the appointive system and black

underrepresentation in Buckingham and Halifax counties. In addition, the plaintiffs failed to establish that the disparities in other three jurisdictions were statistically significant.

Alternatively, the plaintiffs attempt to prove discriminatory effects by focusing on the racial makeup of the officials who appoint school board members in the defendant jurisdictions. The plaintiffs argue that blacks are denied the opportunity to participate equally in the appointment process because most of the officials who select school board members are themselves white. Plaintiffs assert that blacks are underrepresented on the governing bodies that appoint school board members in Petersburg and in Halifax and Prince Edward counties. In Buckingham and Nottoway counties, white circuit judges appoint the selection

commission which in turn chooses the school board members.

We reject the plaintiffs' attempt to prove a discriminatory impact by focusing on the racial makeup of the officials who appoint, either directly or indirectly, the school board members. First, to the degree that blacks are underrepresented on the elected governing bodies in Halifax and Prince Edward counties and the City of Petersburg, the plaintiffs' remedy is to bring a suit under the Voting Rights Act challenging directly the electoral schemes for choosing members of those bodies. Plaintiffs have not mounted such a direct challenge in the present case. As for the fact that white judges are ultimately, though indirectly, responsible for selection of school board members in Buckingham and Nottoway counties, the plaintiffs have

produced no evidence of racial discrimination in the selection of those judges. Circuit judges in Virginia are generally chosen by the state legislature. Va.Code Section 17-121. Yet the plaintiffs have produced no evidence as to the circumstances surrounding the legislature's selection of the circuit judges for Buckingham and Nottoway counties. Many questions are unanswered. For example, did black legislators support the white circuit judges who were ultimately selected? Were the judges endorsed by white legislators who had received widespread black support in the most recent election? The plaintiffs never attempt to answer these questions, but instead focus merely on the race of the circuit judges. The mere fact that the judges were white does not prove that discrimination existed.

In short, the district court did not clearly err in concluding that the appointive system did not have a discriminatory impact on blacks in the five defendant jurisdictions. Having proved no discriminatory effect, the plaintiffs cannot establish a violation of Section 2 of the Voting Rights Act of 1965, even if it applies (a matter of some doubt).

VI.

Having found no violations of the Equal Protection Clause and the Fifteenth Amendment, we likewise conclude that plaintiffs' First and Thirteenth Amendment claims must fail. In voting rights cases, the protections of the First and Thirteenth Amendments "do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments." Washington v. Finlay, 664 F.2d 913, 927

(4th Cir.1981), cert. denied, 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed.2d 1333 (1982).

VII.

In conclusion, the plaintiffs have failed to establish a violation of Section 2 of the Voting Rights Act of 1965 or of the First, Thirteenth, Fourteenth or Fifteenth Amendments. The Judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	87-0633-R
SUSAN H. FITZ-HUGH, et al.	)	
	)	
	)	
Defendants.	)	Filed May 16, 1988

ORDER

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Fed. R. Civ. P. 56.

For the reasons stated in the accompanying memorandum opinion:

The plaintiffs' motion for summary judgment is DENIED.

The defendants' motion for summary judgment is GRANTED as to those causes of action alleging violations of the First and Thirteenth Amendments and the due

Process Clause of the Fourteenth Amendment. The defendants' motion is DENIED as to the plaintiffs' claims of violations of the Fifteenth Amendment, the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

Let the Clerk send a copy of this order to all counsel of record.

5/16/88
Date

s/Richard L. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	87-0633-R
SUSAN H. FITZ-HUGH, et al.	)	
	)	
Defendants.	)	

Filed May 16, 1988

MEMORANDUM OPINION

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. The plaintiffs are black representative voters from Nottoway, Buckingham, Prince Edward, Halifax Counties and the City of Petersburg, the Southern Christian Leadership Conference and Citizens for a Better America. They challenge Virginia's appointive process for selecting school board representatives on

the grounds that an appointive process was chosen and is maintained with the intent to deprive blacks of the equal opportunity to participate in the selection of school board members. The defendants are the Secretary of the State Board of Elections, the State Board of Elections, Nottoway and Buckingham Counties' School Board Selection Commissions and Electoral Boards, Prince Edward and Halifax Counties' Boards of Supervisors and Electoral Boards, and Petersburg's City Council and Electoral Board. These are the bodies responsible for the appointment of school boards and the administration of elections.

The plaintiffs allege violations of the First, Thirteenth, Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965 (as amended in 1982), 42 U.S.C. Section 1973. For the

reasons set forth below, the plaintiffs' claims under the First Amendment, Thirteenth Amendment, and the due Process clause of the Fourteenth Amendment are dismissed for failure to state a cause of action upon which relief can be granted. Resolution of the remaining claims on summary judgment is inappropriate on the incomplete record before the Court. The plaintiffs must substantiate the continuing discriminatory effects suggested by the current record. For example, it appears from the limited information before the Court that the manner in which a county chooses a school board has a dramatic effect on black representation. Blacks are underrepresented, in counties with a significant black population, in most instances where school board selection commissions choose school board members. Conversely, the State and

localities, to prevail, must demonstrate that the actions they took to bring about a new age of racial equality in Virginia are causally related to the proportional representation of blacks on school boards.

The plaintiffs challenge each of the four ways school boards are appointed in Virginia. Under Va. Code Section 22.1-34 et seq., the school board is appointed by a three person school board selection commission which is in turn appointed by the local circuit court judge. Nottoway and Buckingham Counties use this system of appointment. Counties which do not have either a County Executive, County Manager, County Board or Urban County Manager form of government are included in Section 22.1-34. Under a 1970 amendent, Va. Code Section 22.1-41, et seq., Nottoway, Buckingham and similarly sit-

uated counties can hold a referendum to transfer the appointment power from the non-elected school board selection commission to the governing body.

Under the second means, Va. Code Sections 15.1-609 County Executive), 15.1-644 (County Manager), 15.1-708 (County Board), or 15.1-770 (Urban County Manager), the county board of supervisors appoints members of the school board. Prince Edward and Halifax counties employ this system. In cities and towns, such as Petersburg, the governing body appoints the school board, Va. Code Section 22.1-50. In three school districts in Virginia, none of which are a party to this litigation, the county board of supervisors and the city's city council appoint the school board where the school district overlaps the city and county boundaries, Va. Code Section 22.1-53.

Although the record is incomplete, there are some facts that are not in dispute.1/ Virginia's General Assembly

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1 The plaintiffs submitted the declaration of Peyton McCrary, a historian who has conducted extensive research in the field of Virginia and Southern voting practices. The declaration is in the form of an affidavit, and Professor McCrary has gathered a wide range of information to support his conclusions and opinion that the appointive system of selecting school boards has been maintained to deprive blacks of participation in the process. Although the defendants have not submitted an affidavit contradicting Professor McCrary's conclusions, McCrary's statement is insufficient to support a motion for summary judgment. An affiant usually has first hand knowledge of the facts he attests to. McCrary's declaration, on the other hand, rests largely on secondary sources--hearsay. Therefore, although his declaration is insufficient for the purposes of a summary judgment motion, his testimony at trial as an expert witness would be probative. See Hunter v. Underwood, 471 U.S. 222, 228-29 (1985).

The plaintiffs have asked that the Court take judicial notice of the facts contained in Prof. McCrary's statement. To the extent appropriate under Rule 201, Fed. R. Evid., the Court has acceded to that request.

in 1870 made the decision to appoint rather than to elect school board members. The Public Free School Law, passed July 11, 1870, provided for the appointment of "school trustees" by the State Board of Education. Acts of the General Assembly of Virginia, 1869-70, Chapter 259, (July 11, 1870), 408-09. (Hereinafter "Acts") The three school trustees appointed in each district had duties similar to modern school boards. In 1877, the General Assembly transferred the appointment decision from the state school board to local school trustee electoral boards comprised of the county superintendent of schools, the county judge and the attorney for the Commonwealth. Acts, 1876-77, Ch. 12, (Jan. 11, 1877), 9-10. Although the selection switched back to a central board at times, the local appointive bodies were

responsible for selecting school board members at the turn of the century.

At the Virginia Constitutional Convention of 1901-02, the Convention considered the possibility of electing local school boards. The Committee on Education recommended that the new constitution provide:

> In each school district there shall be elected by the people three school trustees, whose terms of office shall be four years: Provided, that in cities and towns constituting separate school districts school trustees shall be elected or appointed, as may be provided by law.

Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, 1901-02, 1828 (1928). Mr. McIlwain, a proponent of the provision, reported that the rationale for the change was that the current system resulted in nepotism, inefficient school systems and a lack of responsiveness to

the people. Id. Immediately, an amendment was offered which replaced the words "elected by the people" and substituted the words "selected in a manner provided by law," and deleted the last phrase beginning "Provided."

The amendment prompted a debate led by Mr. J.B.T. Thornton, a member of the Committee on Education, who announced:

> [I] shall vote against the report made by the committee for this reason . . . Although it is claimed that the white people control absolutely their local affairs throughout the State, it is a mistake, and if this report is adopted, as presented here, there are a number of counties in the State in which we will have negro [sic] trustees. That is a condition of affairs that is abhorrent . . . I believe we would be doing injustice to the white people of the State to undertake to place election of trustees in the hands of the people.

Proceedings at 1829. His comments were echoed by another, Mr. Eggleston:

> I endorse everything that has been said by the gentleman from Rockingham on this subject, and will add that, as the matter now stands, we would not only be liable, but likely to have negro [sic] school trustees in a good many districts in the State, if the trustees are going to be elected by the people.

Id. After changing the period of appointment from 4 years to that to "be prescribed by law," the Convention passed the amended provision. The provision in effect left it up to the General Assembly to decide the method of selection.

In 1904, the General Assembly enacted a law that provided for the establishment of local school trustee electoral boards comprised of the superintendent, the Commonwealth's attorney and a private citizen appointed by the circuit court judge. Acts, Extra Session 1902-04, Sections 1450, et seq., 806-812. In 1926, the composition of the elec-

toral board was changed to three citizens all appointed by the local circuit judge, Acts, 1926, Chap. 106, 104, and changed again in the 1930's to allow for counties with county manager or county executive forms of government to have the school board appointed by the Board of Supervisors.

In 1947, the General Assembly amended the statutes governing school board selection to provide certain counties the option to elect school board members. Acts, 1947, Chap. 61 (Jan. 30, 1947), 113-16. Arlington county thereafter elected a five-member school board in an at-large election. In 1956, the General Assembly repealed the local election provision and adopted Va. Code Section 22-83.2 which stated that "no school board shall be elected by popular vote in and for any county or city."

Acts, 1956, Chap. 591, (March 31, 1956), 949-50. The repeal of the elective option followed in the wake of the Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954).

The appointive process has also been modified slightly in recent years. In 1970, counties that use school board election commissions (Va. Code Section 22.1-34) were granted authority to change to a system, if the populace voting by referendum agreed, where the elected governing body appoints the school board members. Va. Code Section 22.1-42. The General Assembly also added in 1980 a provision that allows a county to return to the use of using school board election commissions. Va. Code Section 22.1-45. A 1985 amendment requires that a public hearing be held "to receive the views of citizens within the school division" on

school board members who may be appointed by the county Board of Supervisors. Va. Code Section 22.1-29.1 (1985).

In this case, the Court is asked to consider these state statutes and the interplay of several constitutional amendments. In seeking to draw the boundaries of the scope of each of these constitutional provisions, the Court must be careful not to read one amendment so expansively as to render another amendment superfluous. Prior precedent and reason suggest that the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment reach further in these circumstances and afford greater protection than the First and Thirteenth Amendments. Consequently, only the Fourteenth Amendment's Equal Protection clause, the Fifteenth Amendment and Voting Rights Act possibly provide the

plaintiffs protection from the alleged evils of Virginia's statutory scheme. Therefore, the plaintiffs First Amendment, Due Process and Thirteenth Amendment claims must be dismissed.

The First Amendment protects the right to associate for political purposes and to participate in the political progress at the local level. This protection does not create any entitlement for blacks to have greater participation in the appointment of school board members than afforded by Virginia's facially neutral statutes. See Sailors v. Kent Board of Education, 387 U.S. 105, 108 (1967) (The Court found no constitutional prohibi-tion to appointive school boards.) The plaintiffs argue that the statutes violate the First Amendment as applied because the 1904 and 1956 General Assemblies enacted and

maintained the statutory scheme for the purpose of denying blacks access to the political process. Because the statutes were enacted for an illegal motive, they violate the First Amendment, assert the plaintiffs. The Supreme Court has repeatedly rejected such an argument:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exercised." McCrary v. United States, 195 U.S. 27 (1904).

United States v. O'Brien, 391 U.S. 367, 383 (1968) See also, Arizona v. California, 283 U.S. 423 (1931).

To prevail the plaintiffs must demonstrate "that the inevitable effect

of a statute on its face may render it unconstitutional." O'Brien, 391 U.S. at 384 (emphasis added). "Inevitable effect" has been narrowly defined. In Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court invalidated a tax on publications because the statute on its face imposed a tax only on publications--infringing the publications' freedom of press rights. Similarly in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court overturned the redrawing of municipal boundaries because the "inevitable effect," 364 U.S. at 341, was "to deprive the petitioners of their right to vote for no reason other than they were Negro." O'Brien, 391 U.S. at 385. "In these cases, the purpose of the legislation was irrelevant, because the inevitable effect--the 'necessary scope and operation,' McCrary v. United States,

195 U.S. 27, 59 (1904)--abridged constitutional rights." Id. The statutes attacked in the instant case have no such inevitable unconstitutional effect. Although several original supporters of an appointive school board scheme hoped the effect of the statutes would exclude blacks from school boards, the effect was by no means "inevitable." Indeed, one of the central disputes in this litigation is the effect of these statutes on blacks' role in the selection of and participation on school boards. Virginia's appointive scheme does not facially place a unique burden on blacks such as a newspaper tax, nor does it exclude black participation with the precision of a municipal boundary.

For similar reasons the plaintiffs' claim under the due Process clause of the Fourteenth Amendment cannot withstand the

defendants' summary judgment challenge. The Fourteenth Amendment provides in part that no "state shall deprive any person of life, liberty, or property, without due process of law..." A party seeking relief under the Due Process clause must establish first, that he has been deprived by the state of "life, liberty, or property," and second, that the deprivation occurred without "due process." No liberty interest or property right is implicated here. No constitutional provision prohibits the appointment of school boards, Sailors v. Kent County, 387 U.S. 105, 108 (1967), nor is there any First Amendment right at stake.

The plaintiffs rely upon Duncan v. Poythess, 657 F 2d 691 (11th Cir. 1981), reh. denied 664 F.2d 291, cert. dismissed 459 U.S. 1012 (1982), but this case is inapposite. In Duncan, the governor of

Georgia appointed a state Supreme Court justice instead of holding a special election to fill a vacancy created by a resigning justice. The appointment contravened state law, as the court noted: "It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law..." Id at 704. Here, the act of appointing school boards does not violate any law. It does not contravene a pre-existing right to vote.

The plaintiffs also suggest that the discriminatory intent of the legislature in enacting these statutes make them a violation of due process. This argument fails for the same reasons as their First Amendment argument. Legislative intent standing alone is not enough. Palmer v. Thompson, 403 U.S. 217, 224 (1971) (Speaking about the Equal Protection

clause, the Court stated: [N]o case in this Court had held that a legislative act may violate equal protection solely because of the motivations of the man who voted for it.") To trigger close judicial scrutiny of a legislative enactment, the plaintiffs must first identify the fundamental right the statute infringes upon. They have not done so here. Therefore the plaintiffs' Due Process claim is dismissed.

The plaintiffs have also asserted a Thirteenth Amendment claim. That amendment reads: "Neither slavery nor involuntary servitude... shall exist within the United States..." The core of litigation under this statute has been challenges to practices that amount to involuntary servitude. See, e.g., Hurtado v. United States, 410 U.S. 578 (1973) (incarceration of witness for want of secu-

rity of his appearance and payment of $1 a day as a witness fee is not involuntary servitude); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (state statute penalizing lessor's intentional failure to furnish tenant water or heat did not amount to involuntary servitude); United States v. Wright, 474 F.2d 853 (9th Cir.), cert. denied 414 U.S. 870 (1973) (requiring work of national import in lieu of military service is constitutional); Bertelsen v. Cooney, 213 F.2d 275 (5th Cir.), aff'd) 348 U.S. 890 (1954) (special draft registration of doctors); NLRB v. Wine, Liquor & Distillery Workers Union, et al., 178 F.2d 584 (2nd Cir. 1949) (statute prescribing secondary boycott as an unfair labor practice is constitutional); Freeman v. Freeman, 397 A.2d 554 (D.C. 1979) (ordering the parent to pay child

support and to seek gainful employment does not violate the Constitution).

The Thirteenth Amendment has also been used as a tool to eradicate all "incidents and badges of slavery." Washington v. Finlay, 664 F.2d 913, (4th Cir. 1981), cert. denied 457 U.S. 1120 (1982); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Although the debates of the 1902 Constitutional Convention certainly sugggest that an appointive system for the selection of school boards was chosen to limit black participation, the protection afforded by the Thirteenth Amendment, however, cannot be interpreted to reach all acts of racial discrimination. The Fourth Circuit's decision in Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981), gives guidance: "In the realm of voting, we think the thirteenth amendment offers no protections not al-

ready provided under the fourteenth or fifteenth amendments." Congress has enacted legislation that not only gives practical effect to the Thirteenth Amendment, but also sets the parameters of the amendment's reach. See Memphis v. Greene, 451 U.S. 100, 131-35 (1981) (Justice White, concurring); 42 U.S.C. Sections 1981, 1982. With no precedent to guide it and no need to break new ground in this area, the Court holds that the Thirteenth Amendment does not reach the actions complained of here. The Fifteenth Amendment, the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment address the issues directly and can provide adequate protection and relief to the plaintiffs.

To state a cause of action under the Fifteenth Amendment, the plaintiffs must show an outright denial of the ballot by

the state with a racially discriminatory motive. The State suggests that since the school board is an appointive system, no right to vote is implicated.

After 1947, however, the school board could have been an elected body. An act of the General Assembly permitted counties that operated under a county manager system and which had abolished magisterial districts to elect its school board. Acts, 1947, Chap. 61 (Jan. 30, 1947), 113-16 (adding new sections Va. Code Sections 22-84 -22-88.1) Although only Arlington County qualified at the time, the law was enacted as a general law.2/ Over the course of time and demographic changes, every county in the state may have qualified under the law. In 1956, the General Assembly re-

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2 See, Acts, 1947, Chap. 41, (Jan. 30, 1947) 91-93.

pealed this grant of the ballot. The Court judicially notes that the repeal followed closely after the Supreme Court handed down Brown v. Board of Education, 347 U.S. 483 (1954), and the plaintiffs have submitted evidence that the repeal was motivated in part to ensure that blacks would not become influential on school boards. In 1956, then, the Fifteenth Amendment was an appropriate means for attacking the new legislation. Thirty years later, the burden rests with the plaintiffs to demonstrate that they are currently harmed by the decision in 1956 to return to an appointive system and that the harm warrants the remedy they seek.

Notwithstanding the 1947 act and its repeal in 1956, the Fifteenth Amendment is also the appropriate means by which to challenge the appointive system given the

peculiar character of school boards. They are not purely administrative bodies. Whether appointive or elected, they are politically suffused. The actions of the school board are the subject of constant debate among citizens. It is the body charged with maintaining the type of schools people want at a price people are willing to pay. Thus, it is nearly impossible for the school board to escape from the its [sic] political aura. As further evidence of its political nature, every other state in the country permits some form of elective school boards.

The Voting Rights Act of 1965, 42 U.S.C. Section 1973 (1986) also provides plaintiffs a cause of action. Under Section 2 of the Voting Rights Act, a plaintiff must demonstrate that the proscription of a "voting qualification

or prerequisite to voting or standard, practice or procedure... which results in a denial or abridgment of the right of any citizen... to vote" was motivated by race. Furthermore, "a violation... is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivisions are not equally open to participation by members of a class of citizens... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. Section 1973.

The plaintiffs claim that the statutory scheme of selection, a "practice or procedure," replaced in 1956 their right to vote for school board members for racially discriminatory reasons. The

effect of this practice, assert the plaintiffs, is to deny them the opportunity to equally participate in the political process. Therefore, the plaintiffs have stated a prima facie case. However, even if the 1956 General Assembly's act of repealing the possibility of electing school board members is interpreted to be a denial of the right to vote, there is still a problem of retroactivity.

The Voting Rights Act was enacted in 1965. The General Assembly repealed the right to vote for school boards in 1956. There is nothing in the statute's plain language, legislative history, or judicial construction to suggest that the Act is retroactive. Since there has not been any similar denial since 1956, the states' argument that the Voting Rights Act cannot apply because there has been

no denial of the right to vote seems persuasive at first blush. The Voting Rights Act's remedial purpose requires that the Court inquire further into the State's practice. The Act is designed to ensure minority voters, who have historically been victims of purposeful discrimination, an effective right to political participation. S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S. Code Cong. and Ad. News 177. The plaintiffs allege that Virginia enacted and has maintained an appointive system in order to diminish black participation in the school board process. If the selection process was elective, federal statutes and constitutional provisions regulating state behavior would surely govern. Since the process is appointive, argues the State, the federal statutes do not govern. The

Voting Rights Act, however, seeks to purge the political process of all means employed to diminish minority voting power, specifically including "shifts from elective to appointive office." H. Rep. 97-227, 97th Cong., 2d Sess. 18 (1982). Although the shift from potentially electing school board members to appointing them occurred before the passage of the Act, the effects, if any, of that decision are felt each time a school board is selected.

To hold, as the State requests, that the Voting Rights Act applies only to instances where a state chooses to hold elections but does not apply where the state purportedly rejects elections in favor of a discriminatory appointive system would unnecessarily narrow the limits of the Voting Rights Act. To be fully effective, the Voting Rights Act

must reach all state behavior designed to limit participation in the political process because of a person's skin color.

Arguably such an expansive reading of the Voting Rights Act threatens to encroach on areas reserved to the states by the Constitution. The Supreme Court, in considering the constitutionality of the Act, wrote:

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.
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> . . .
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> The gist of the matter is that the Fifteenth Amendment supercedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. at 347, 5 L. Ed. 2d at 117.

South Carolina v. Katzenbach, 383 U.S. 301, 324-25 (1966). Therefore, the Voting Rights Act does not necessarily reach a state's decision to make an office appointive or elective, but does reach such action where an appointive system is selected over an elective system for the purpose of excluding blacks from the political process. Although Virginia made this alleged decision prior to the enactment of the Voting Rights Act, the plaintiffs can still state a claim under the Act to the extent that the effects of that decision are currently felt by the black population.

Similarly, the plaintiffs have stated a claim under the Equal Protection clause of the Fourteenth Amendment and have presented evidence sufficient to withstand the defendants' motion for

summary judgment. The Equal Protection clause mandates that "No state shall... deny to any person within its jurisdiction the equal protection of the laws." Although the plaintiffs do not have a constitutional right to be appointed to local school boards, they do have a right to be considered for public service on an equal basis with whites. They claim that the appointive system cannot give them an equal opportunity for appointment because of its original discriminatory purpose.

The plaintiffs assert that they need only demonstrate that the appointive system was originally enacted in 1904 and reinstated in 1956 to deprive blacks of equal participation in the school board selection process in order to prevail on their Fifteenth Amendment, Voting Rights Act, and Equal Protection clause claims. This argument fails for several reasons.

First, as noted earlier, conclusive evidence of the original drafters' intent and the 1956 legislators' motivation is not properly before the Court for purposes of summary judgment. The testimony of experts on their interpretation of events and sources for their opinions can be heard at trial. To accept the facts as set forth in the expert's affidavit would exceed the Court's power of judicial notice and force the Court to decide issues of material fact which the defendants contest, a task forbidden by Rule 56, Fed. R. Civ. P., on summary judgment motions.

Second, even if the Court accepted the facts as set forth by the plaintiffs' expert as true, the events complained of happened long ago. The plaintiffs complain of current harm, and therefore must demonstrate current acts that work

to deprive them of equal participation in the school board selection process The Fifteenth Amendment's and the Voting Rights Act's prohibitions on racially motivated denials of the ballot speak of current discrimination, not past acts of discrimination. Hence it is incumbent upon the plaintiffs to demonstrate that the appointive system, allegedly conceived and maintained for the purpose of limiting black participation, currently succeeds in its original goal

In Hunter v. Underwood, 471 U S 222 (1985), the Supreme Court implicitly ruled that even where there is clear legislative history that a statute was passed with discriminatory intent, plaintiffs must demonstrate disparate impact as well In Hunter the plaintiffs challenged an Alabama law which disenfranchised citizens convicted of "any

crime... involving moral turpitude." At trial, the plaintiffs demonstrated that when enacted in 1901, the law was intended to have a disproportionate impact upon blacks. The plaintiffs also proved that the statute continued to currently have that effect. In striking down the law, the Supreme Court noted that the statute's "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such it violates the [Constitution]..." Id. at 233. See also, Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977) upon which the decision in Hunter rests.

Similarly, in Searcy v. Williams, 656 F.2d 1003 (5th Cir. 1981) aff'd sub nom. Hightower v. Searcy, 455 U.S. 984

(1982), where the plaintiffs also challenged an appointive school board selection process on Fourteenth and Fifteenth Amendment grounds, the Court struck down a statute conceived with discriminatory intent because of its present discriminatory effect against blacks:

> [T]he tainted origin of the school board has been carried forward to the present day by the self-perpetuating method of selection to the Board. Regardless of whether the school board selection scheme was purposefully conceived to further discrimination, however, the system has clearly operated purposefully to further discrimination. We hold, therefore, that this unique system for selection of the school board that was operated in discriminatory manner, together with the self-perpetuation of the Board of Education... is violative of the appellants' rights under the Fourteenth Amendment.

Id. at 1010. (footnote omitted).

The role of original intent and

current effects is slightly more complicated under the Fourteenth Amendment's analysis. If the plaintiffs demonstrate that the appointive system was originally created and maintained with the intent of depriving blacks of meaningful input into the school board selection process, the burden of proof switches to the State and counties to demonstrate that the current system has not been perpetuated to intentionally discriminate against blacks. See, Hunter v. Underwood, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to all the law's defenders to demonstrate that the law would have been enacted without this factor."); Keyes v. School District No. 1, 413 U.S. 189 (1973). The issue before this Court

is not so much the original intent of the statutory scheme but its continuing effects today. Consequently, the analysis presented in Keyes is more applicable. In Keyes, the plaintiffs challenged a Denver school desegregation plan. The Court stated, "There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.' 9 J. Wigmore, Evidence Section 2486 at 275 (3rd Ed. 1940)." 413 U.S. at 209. The plaintiffs in Keyes, as in the instant case, alleged that there was an uncontested pattern of past intentional discrimination.3/ The Court

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3 In Keyes, the Supreme Court had previously made a finding that the school district's prior plan was intentionally discriminatory. The plaintiffs note that in the instant case, the Supreme Court

in Keyes held "that a [prior] finding of intentional segregative school board actions in a meaningful portion of a school system... establishes... a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system era not also the result of intentionally segregative actions." Id. at 208. A similar shift of the burden of persuasion seems appropriate here. If the plaintiffs succeed in demonstrating that the appointive scheme was conceived and maintained in the past with the intent of discriminating against blacks, the state should bear the burden

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has previously determined that the purpose of the Virginia constitutional Convention of 1902 was "the desire to disenfranchise the Negro." Harman v. Forssenius, 380 U.S. 528, 543 (1965).

of demonstrating that the scheme is not currently being perpetuated for this purpose.

Virginia has offered evidence to meet this burden of persuasion. It argues that the State Constitution of 1971 repudiated the Constitution of 1902 and its constitutional debates and signaled the dawn of a new era in Virginia, an era which, among other things, renounced the policies of massive resistance. Also as part of the ratification process, the Code of Virginia was re-enacted and re-numbered. This process, argues the State, created a new organic law purged of the racist taint of the 1902 Constitutional Convention. The State has failed to demonstrate, however, that these acts in and of themselves are causally related to the appointment scheme. In passing the

new state constitution, the state did not address directly the issue of appointive school boards or the policies of massive resistance. Nor did the re-enactment of the Code, little more than a paper act, confront the issue of school board selection. Similarly, the enactment of a plethora of civil rights legislation in the last eighteen years, such as the Fair Housing Act of 1972, is but circumstantial evidence of the difference in attitudes of the Virginia of 1988 and that of 1956 and 1902. More probative of the issues involved are the bills that have been introduced since 1971 and the legislative reports they have generated.4/ But this evidence alone is

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4 The General Assembly has considered bills to change the selection process in 1973 (H.B. 1385 and H.B. 1082, dealing only with Arlington County), 1974 (H.B. 481, H.B. 615 and H.B. 1028); 1976 (H.B. 29, H.B. 38, H.B. 495, S.B. 37, and S.B. 38); 1977 (H.B. 2059), 1978 (H.B.

insufficient to carry the State's burden of proof.

The most important indicia of the lack of discriminatory intent in the appointive scheme, according to the State, is the fact that black representation on Virginia's school boards is directly proportional to [the] number of blacks that comprise Virginia's voting population. Eighteen percent (18%) of Virginia's voting population is black and blacks comprise eighteen percent of

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112, H.B. 300, H.B. 749, H.B. 1085, H.B. 1583, H.B. 1709, and S. B. 263), 1979 (H.B. 640, H.B. 1583, H.B. 1709, and H.B. 1805), 1980 (H.B. 147, H.B. 269, H.B. 366, and H.B. 841), 1982 (H.B. 534 and H.B. 633), 1983 (H.B. 112), 1984 (H.B. 105, H.B. 480, and H.B. 593), 1985 (H.B. 1015, H.B. 1342, H.B. 1344, and H.B. 1716), and in 1986 (H.B. 123 and H.B. 191). The General Assembly has also commissioned two legislative studies to review whether some or all school board members should be popularly elected. H. Res. No. 12, 1984 Va. Acts 2270; S.J. Res. No. 135, 1979 Va. Acts 1380.

the school board membership statewide.5/ Moreover, Virginia has the highest percentage of blacks on school boards than any other state. (Statistics of the National School Boards Association, 1986-87). The State contends that this survey is undisputed proof that there is no statewide pattern of discrimination against blacks on Virginia school boards. This proportionality, however, in and of itself, is not enough. It may well be the product of the natural progression of time. To carry its burden of persuasion, the State must demonstrate present evidence of its affirmative acts to purge itself of the statutes' discriminatory

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5 The composition of school boards is derived from information by the Virginia School Board Association and figures representing the racial composition of the voting populace were taken from United States Census Bureau, County and City Data Book, Tables B and C (1983) and Black Elected Officials: A National Roster 409 (16th ed. 1987).

taint. Washington v. Davis, 426 U.S. 229, 241 (1976)

Moreover, the eighteen percent figure is somewhat misleading when voting populations and school board compositions are compared on a county by county and city by city comparison. The parties' surveys reveal that the correlation between voting population and school board composition turns upon the means by which school board members are selected. The Virginia statutory scheme basically permits two means of selecting school boards. Either the elected governing body such as the Board of Supervisors or City Council selects school board members (Va. Code Sections 15.1-609, 15.1-644, 15.1-708, 15.1-770, and 22.1-50) or the chief circuit judge of the county appoints a selection commission which in

turns appoints the school board members. (Va. Code Section 22.1-35).

The parties have examined each school board district in the State, and have compared the racial composition of each school board with the composition of the county's or city's voting population. The parties agree that in 27 to 30 counties blacks are "underrepresented"--the percentage of blacks in the division's population as a whole is greater than the percentage of blacks on the division's school board.[6] At the time the survey was taken, forty-seven (47) local school boards were appointed by selection commissions. (Ninety (90)

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6 The defendants count as underrepresented counties and cities where the disparity between voting population and school board composition is ten percentage points or greater. The plaintiffs apparently take the view that where the addition of one black to the school board would narrow the disparity, the county or city is underrepresented.

were appointed by the local governing body.) (Aff. of Vicki Crews Behr, Assist. Executive Director of Virginia School Boards Association, at 2). In these forty-seven counties, blacks are under represented on the school boards in eighteen instances, and in seventeen of these eighteen counties, blacks comprised fifteen percent or more of the voting population. In only two--Pulaski and Spotsylvania counties-- are blacks "overrepresented," according to the State's survey, on the school board. That a selection process used in only a third of the school board divisions should produce over half the instances where blacks are "underrepresented" is unusual. The correlation suggests that the selection commission process may work a disparate impact upon blacks. "Statistical analyses have served and

will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies..." Mayor of Philadelphia v. Education Equality League, 415 U.S. 605, 620 (1974). Moreover, if upon further analysis the plaintiffs can present more evidence of the correlation between the method of selection employed and underrepresentation of blacks on the school board, the Court may infer "fatal discriminatory purpose... from the overwhelming convincing statistical evidence of unexplained disparity." Searcy v. Williams, 656 F.2d 1003 (5th Cir. 1981), aff'd sub nom. Hightower v. Searcy, 455 U.S. 984 (1982). See also, Castaneda v. Partida, 430 U.S. 482, 494-498 (1977); Turner v. Fouche, 396 U.S. 346, 359-361 (1970).

Although Surry County is not a named plaintiff in this action, its experience is illustrative of the possible effect on blacks of the school board selection commission process. In November of 1971, blacks won three of the five seats on the county Board of Supervisors of Surry County. The school board remained appointed by a selection commission, and whites retained a three to two majority, despite a black voting majority, a black majority on the Board of Supervisors, and an almost entirely black student population. An attempt to shift the selection process from an electoral commission to the Board of Supervisors was defeated in May of 1972. (Aff. of Thomas Hardy, resident of Surry County) But Surry's experience also lends credence to Virginia's claim that the State has entered a new era free of racial

discrimination in the political process. For in 1987, Surry held another referendum on the school board selection issue, and the referendum passed. (Aff. of Thomas Hardy) The next vacancy will be filled by the Board of Supervisors.

The State argues that the effect of a statute in several counties is of no significance, even if the plaintiffs can prove disparate impact. The plaintiffs' challenge is statewide, and, according to the State, the nondiscriminatory administration of the statutes statewide, as reflected in the eighteen percent proportionality between voting population and school board membership, is an absolute defense to constitutional challenges of the statutes. Virginia suggests that according to Lousisiana v. United States, 380 U.S. 145 (1965), the challenged statutes should be invalidated

only if they are applied in a discriminatory manner in every place and have a discriminatory effect in every place they are applied.

However, in Louisiana v. United States, the Supreme Court struck down the challenged statutes "as written and as applied." 380 U.S. at 151. Here the statutes are neutral on their face. Proof of the State's past intentions to discriminate will be insufficient for the plaintiffs to prevail. Hence, the plaintiffs must demonstrate that the statutes as applied disproportionately effect blacks on a magnitude sufficient to create an inference of intentional discrimination. This does not mean that the plaintiffs must show statewide impact or that they must demonstrate a pattern of discriminatory effects under each system of appointment. The plaintiffs

may only be able to demonstrate that only one method of school board appointment results in a pattern of discrimination in a few counties. A constitutional violation would exist even if such violations are not on a statewide scale. Hence, the State confuses the plaintiffs' ability to prove a constitutional violation and the Court's role in fashioning an appropriate remedy. If the plaintiffs succeed in demonstrating constitutional violations in selected counties, then the Court in its equitable powers will fashion the appropriate remedy, which may or may not entail invalidating Virginia's statutes.

The central issue in this matter is does Virginia's use of an appointive scheme continue to deny blacks equal access to participation in the selection of school board members as the scheme was apparently intended. The State has of-

fered evidence that the appointive scheme is maintained for non-racial reasons; that the State has aggressively sought of rid itself and society of past vestiges of racial discrimination; and that the appointive scheme has in fact secured blacks the highest rate of participation on school boards of any state in the country.

The plaintiffs, on the other hand, contend that the system was created and maintained, at least through the period of massive resistance, to purposely exclude blacks from the school board selection process, and the statutes succeed in fulfilling that goal to this day.

The Court cannot reconcile on cross motions for summary judgment these two diametrically different characterizations of the statutes. The record is incom-

plete. The plaintiffs cannot rest their case on acts that occurred eighty-five and thirty years ago. They must offer proof of current intentional acts to impede blacks' opportunity to participate equally in the school board selection process. This evidence may include statistical data demonstrating the current scheme's disproportionate impact upon blacks, an impact sufficient from which to draw an inference of intent. Similarly, the State cannot rest on its argument that time has removed the taint of racial prejudice attached to the appointment scheme. It must show that the affirmative acts it has taken are causally related to the apparently racially neutral school board selection process as suggested by the eighteen percent participation figure. Moreover, it cannot rely on a "statewide approach"

to defeat inferences of intentional discrimination in those instances where plaintiffs demonstrate that the statutes have a disproportionate impact upon blacks.

The plaintiffs' Fifteenth Amendment, Voting Rights Act, and Fourteenth Amendment's Equal Protection Clause claims survive the motions for summary judgment. The plaintiffs have the burden of proving by a preponderance of the evidence the State's discriminatory intent in denying blacks the right to equal participation in the school board selection process in violation of the Fifteenth Amendment. Under their voting Rights Act claim, the plaintiffs also have the ultimate burden of proof and can carry this burden by either demonstrating "intent" or "effects" as defined in the amended Act. 42 U.S.C. 1973(b). Under

the Fourteenth Amendment's Equal Protection analysis, the plaintiffs' initially have the burden of proof. But if they can establish a past pattern of intentional discrimination, the State will bear the burden of proving that the statutes and procedures required by them are racially neutral. To rebut this showing, the plaintiffs will have to present the same evidence needed to carry their claims under the Fifteenth Amendment and Voting Rights Act.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

5/16/88
Date

s/Richard L. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 87-0633-R
SUSAN H. FITZ-HUGH, et al.	)	
Defendants.	)	

Filed June 20, 1988

ORDER

This matter is before the Court on the plaintiffs' motion in limine. The plaintiffs' seek to exclude the testimony of legislators and members of Virginia's Constitutional Committee as to the legislative intent surrounding Virginia's Constitutional Committee as to the legislative intent surrounding Virginia's maintenance of a system of appointed

school boards.

For the reason's stated in the accompanying memorandum opinion, the relief sought by the plaintiffs' in their motion in limine is GRANTED.

Let the Clerk send a copy of this order to all counsel of record.

June 20, 1988
DATE

s/Richard L. Williams
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	
SUSAN H. FITZ-HUGH, et al.	)	87-0633-R
	)	
	)	
Defendants.	)	

Filed June 20, 1988

MEMORANDUM OPINION

This matter is before the court on the plaintiffs' motion in limine. The plaintiffs' seek to exclude the testimony of legislators and members of Virginia's Constitutional Committee as to the legislative intent surrounding Virginia's maintenance of a system of appointed school boards. For the reason's set forth below, the plaintiffs' motion is granted.

Three causes of action survived the

parties' cross motions for summary judgment: a Fifteenth Amendment claim, a Voting Rights Act claim, and an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. In its earlier Memorandum Opinion addressing the issues raised on summary judgment, the Court ruled that, under the Equal Protection Clause claim, if the plaintiffs demonstrate that the statutory appointive scheme was enacted to limit blacks' participation in selecting and serving on school boards, then the burden of proof will switch to the defendannats to demonstrate that the current system has not been perpetuated to intentionally discriminate against blacks. Hence the legislative history of recent General Assembly bills and the intent of the 1971 Constitution are relevant to the extent that they address issues concerning the

appointment of school boards.

Committee reports, the text of proposed bills, amendments, and other related documents compose the competent legislative history of school board legislation. From these documents, legislative intent can be discerned. "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes or its meetings, or reports." Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 268 (1977). The defendants apparently wish to enrich the legislative history with the statements of various legislators as to their perceptions of the legislative intent of various bills. Only "[i]n some extraordinary instances [should] the members [of the legislative

body]... be called to the stand at trial to testify concerning the purpose of the official action..." Id. See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (The court noted that testimony of public officials as to the intent of their administrative decision is "usually to be avoided." Where there is an official record documenting the decision, "there must be a strong showing of bad faith or improper behavior before such an inquiry may be made.") No extraordinary circumstances exist in this instannace to merit such an intrusion into the legislative process.

Moreover, choosing several legislators from among many to testify as to the intent of the entire legislature is a poor means of ascertaining legislative intent. Each legislator is likely to unintentionally incorporate her

own subjective perceptions of the purposes and intentions of the bills and amendments to which she is to testify. Such testimony is as likely to misinform as it is to inform the Court. Committee reports and the text of proposed bills and amendments are a more reliable [sic] sources of legislative intent.

Testimony concerning the intention of various constitutional provisions is also inappropriate for the same reasons. The constitution and its commentary speak of the document's intentions.

The defendants, however, are free to present other testimonial evidence of Virginia's efforts to repudiate purported discriminatory policies of past generations and to purge the appointive system of its allegedly racially discriminatory purpose.

Let the Clerk send a copy of this

memorandum opinion to all counsel or record.

June 20, 1988
DATE

s/Richard L. Williams
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
v.	)	
	)	87-0633-R
SUSAN H. FITZ-HUGH, et al.	)	
	)	
	)	
Defendants.	)	

Filed August 18, 1988

FINAL ORDER

This matter came before the Court for a trial to the bench. Pending before the Court are the plaintiffs' requests for certification of plaintiff and defendant classes and their claims under the Fourteenth and Fifteenth Amendments and the Voting Rights Act.

For the reasons stated in the accompanying Findings of Fact and Conclusions of Law, the plaintiffs'

requests for class certification are DENIED. The plaintiffs' requests for injunctive and declaratory relief are also DENIED. Judgment is entered for the defendants and against the plaintiffs on all of the plaintiffs' claims, and this action is dismissed with prejudice.

Let the Clerk send a copy of this final order to all counsel of record.

Aug. 18, 1988
DATE

s/Richard L. Williams
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

DARIUS IRBY, et al.	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
v.	)	
	)	87-0633-R
SUSAN H. FITZ-HUGH, et al.	)	
	)	
	)	
Defendants.	)	

Filed Aug. 18, 1988

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for a trial to the bench. After hearing the evidence presented at trial, reviewing the stipulations, considering the exhibits and depositions submitted, and having benefited from the closing arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. Plaintiffs Darius Irby and John S. Neal are black citizens and registered voters of the Commonwealth of Virginia and residents of Nottoway County.

2. Plaintiff Charles W. White is a black citizen and registered voter of the Commonwealth of Virginia and a resident of Buckingham County.

3. Plaintiff the Reverend James Samuel Williams, Jr. is a black citizen and registered voter of the Commonwealth of Virginia and a resident of Prince Edward County.

4. Plaintiff Cora Tucker is a black citizen and registered voter of the Commonwealth of Virginia and a resident of Halifax County.

5. Plaintiffs Willie Powell and Milton Richardson are black citizens and registered voters of the Commonwealth of Virginia and residents of the City of

Petersburg.

6. Plaintiff Virginia Unit of the Southern Christian Leadership Conference ("SCLC") is a non-profit grassroots organization of more than one thousand persons dedicated to protecting and advancing civil rights. The Virginia Unit of the SCLC claims its membership is harmed by Virginia's appointive procedure.

7. Plaintiff Citizens for a Better America is a non-profit grassroots civil rights association, organized in Halifax County. It has worked for the past twelve years to promote civil rights in Virginia and claims its members are harmed by Virginia's system of appointing school board members.

8. The concentration of black citizens in Virginia's various counties varies from county to county as does the

alleged amount of "underrepresentation" on school boards. "Underrepresentation" of blacks on local school boards is blacks, by virtue of their percentage of the local population, would be expected to have one or more additional black school board members. Consequently, the harm, if any, suffered by the plaintiffs and the class they seek to represent varies from district to district. There is no typical plaintiff.

9. Defendants include the members of the School Board Selection Commissions ("SBSC") of Nottoway and Buckingham Counties, the two defendant jurisdictions which select school board members by this method.

10. Also named as defendants are the members of the Board of Supervisors of Prince Edward and Halifax Counties who are responsible for appointing school

board members in their respective jurisdictions and members of the City Council of Petersburg who are charged with appointing school board members for that jurisdiction.

11. The third category of defendants consists of the members of the Electoral Boards of each of the named jurisdictions and Susan H. Fitz-Hugh, Secretary of State Board of Elections, who were named as necessary parties for purposes of fashioning possible relief.

12. In each of the named defendant jurisdictions, the level of black participation differs. Hence, the racially discriminatory effects, if any, of the appointive scheme are unique to each jurisdiction. Also, the details of the appointment process--who participates and to what extent, how nominations are received or solicited, and any develop-

ment of formalized procedure--are all determined autonomously at the local level. For example, in Petersburg, the city maintains a "Talent Bank" of interested citizens. The appointing board generally limits its consideration of potential board appointees to those persons who have submitted their names to the Talent Bank. The City of Charlottesville, not a defendant, mails copies of its announcement for openings to the ministers of the seven predominantly black churches in the city, the president of all the neighborhood associations in Charlottesville, and to the president of the N.A.A.C.P. Consequently, there is no typical defendant jurisdiction.

13. There are one hundred thirty-six school districts in Virginia, and school boards in these districts are

appointed in one of four ways. Under Va. Code Section 22.1-34 et seq., the school board is appointed by a three person school board selection commission which is in turn appointed by the local circuit court judge. Nottoway and Buckingham Counties use this system of appointment. Counties which do not have either a County Executive, County Manager, County Board or Urban County Manager form of government are included in Section 22.1-34. Under a 1970 amendment, Va. Code Section 22.1-41, et seq., Nottoway, Buckingham and similarly situated counties can hold a referendum to transfer the appointment power from the non-elected school board selection commission to the governing body.

14. Under the second means, Va. Code Sections 15.1-609 (County Executive), 15.1-644 (County Manager),

15.1-708 (County Board), or 15.1-770 (Urban County Manager), the county board of supervisors appoints members of the school board. Prince Edward and Halifax counties employ this system. In cities and towns, such as Petersburg, the governing body appoints the school board. Va. Code Section 22.1-50. In three school districts in Virginia, none of which are a party to this litigation, the county board of supervisors and the city's city council appoint the school board where the school district overlaps the city and county boundries, [sic] Va. Code Section 22.1-53.

15. The Public Free School Law, passed July 11, 1870, provided for the appointment of "school trustees" by the State Board of Education. Acts of the General Assembly of Virginia, 1869-70, Chapter 259, (July 11, 1870), 408-09.

(Hereinafter "Acts"). The three school trustees appointed in each district had duties similar to modern school boards. There is no evidence, direct or circumstantial, that the original decision to make school boards appointive rather than elective was motivated by racial discrimination. The decision was made in the era of Reconstruction. Concerted efforts to exclude blacks from the political process in Virginia did not begin until 1874-1875. (Testimony and Affidavit of Peyton McCrary.)

16. Even modifications made to the appointive scheme at a time when Democrats were enacting other laws designed to limit black participation in Virginia politics send a mixed message. When conservatives came to power in 1877, they transferred the appointment power from the state school board to local

school trustee electoral boards comprised of the county superintendent of schools, the county judge and the attorney for the Commonwealth. Acts, 1876-77, Ch. 12, (Jan. 11, 1877), 9-10. The effect of this action was racially neutral. In counties with Readjuster or Republican judges, commonwealth attorneys, or school superintendents, the local trustee electoral boards named board members sympathetic to black education, and in black majority counties, they named blacks as school trustees. (Testimony of Peyton McCrary).

17. In 1884, the appointive scheme was again modified to provide for the appointment of members to school trustees electoral commissions by the General Assembly. Acts (1883-84), Ch. 138, (Feb. 20, 1884), 177-78. Again the discriminatory intent of this change is unclear.

Historians disagree as to whether this change was racially motivated. (See testimony of Peyton McCrary and Peter Stewart). Moreover, although the legislation was enacted by a conservative minded General Assembly, Readjuster Governor William E. Cameron, a member of a party committed to blacks' rights, approved the legislation. Finally, even if racially motivated, the modification was short-lived. The power to appoint was restored to local county officials in 1887. Acts, (Extra Sess., 1887), Ch. 233, (May 14, 1887), 305-06. Between 1887 and 1901, however, no blacks were appointed as school board members. (Testimony of Peyton McCrary).

18. By the time of the Virginia Constitutional Convention of 1901-02, the scheme for appointing the selection commission for the subsequent selection

of school trustees was well established. During the course of the convention, the education commission proposed changing the means of selection to make school trustees elective offices. Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, 1901-02, 1828 (1928). The proposed change to the existing scheme was defeated in part for racial reasons. Mr. J.B.T. Thornton, a member of the Committee on Education, opposed the change on the grounds that blacks may be elected, "a condition of affairs" that he found "abhorrent." Debates, at 1829. His comments were echoed by another, Mr. Eggleston. Id. The convention chose to leave the appointive scheme intact, aside from a few minor changes. The predominate intent of the 1901-02 convention, however, was not the

disenfranchisement of blacks, but the disenfranchisement of the impoverished. This intention surfaced in the discussion of the school board amendment. Mr. Summer commented:

> Now gentlemen, come forward like men and vote your sentiments and say that the poor white man and the negro [sic] shall have no rights in Virginia, so that they may emigrate to a richer and more fertile and liberty-loving soil.

Debates at 1830. The intent, therefore, was to reduce poor whites and blacks to the status of women--disenfranchised.

19. The amendment to change the method of selection was defeated, and in 1903 the General Assembly preserved the appointive scheme but replaced the circuit court judge's position on the school trustee electoral commission with a private citizen appointed by the circuit court judge. Acts, (Extra

Session 1902-04), Ch. 509, (Dec. 28, 1903), 806-812, Sections 1450, et seq., City and towns continued to appoint their own school trustees. Acts, (1902-04),Ch. 512, (Dec. 31, 1903), 825-28, Section 1528.

20. Significantly, the General Assembly did not adopt an elective school board scheme after purifying the electorate of those the Convention felt to be undesirable. Such a well timed switch would have extinguished some legislators' fears that a few school trustee electoral commissioners may be sensitive to black educational needs. The evidence suggests, however, that the political machine, spawned by the purified electorate, successfully controlled the county school trustee board so as to make an elective system unnecessary in order to exclude blacks from the process.

21. Although three separate studies recommended that Virginia elect its school board members, the General Assembly resisted such advice and modified the existing structure. In 1926, the composition of the electoral commission was changed to three citizens all appointed by the local circuit judge, Acts (1926), Ch. 106, (March 6, 1926), 104, and changed again in the 1930's to allow for counties with county manager or county executive forms of government to have the school board appointed by the Board of Supervisors.

22. In 1947, the General Assembly departed from the appointive scheme and passed a general law which permitted "any county operating under the county manager plan... and in which county magisterial districts have been abolished.." to elect its school board members if a majority

approved this change by referendum. Acts (1947), Chap. 61 (Jan. 30, 1947), 113-16. Only Arlington County qualified under this provision. After voters approved the change, a five-person school board was thereafter elected at large in non-partisan elections until 1956. Arlington never elected a black to serve on the school board during this period.

23. In 1956, following a lawsuit by the N.A.A.C.P., Arlington agreed to desegregate its school system in compliance with Brown v. Board of Education, 347 U.S. 483 (1954). Shortly thereafter, the General Assembly abolished Arlington's elective system as part of a program of "massive resistance" to court-ordered school desegregation. Acts (1956), Chap. 591, (March 31, 1956), 949-50 ("[N]o school board shall be elected by popular vote in and for any

county or city."). Arlington's Board of Supervisors appointed members to the school board thereafter.

24. In 1968-69, Virginia created a Constitutional Revision Commission dedicated to restoring order to the mayhem wreaked upon the state's educational system by its policy of massive resistance. The Commission drafted a new constitution which was approved of by two successive General Assemblies. The 1971 Constitution provides in Article VIII, Section 1: "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained." Furthermore, in Section 2, Article VIII mandates that "The General

Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions." The language in Section 2 places a legal responsibility on both the locality and State to provide funds for schools. In effect then, the 1971 Constitution eliminates the discretion previously enjoyed by localities to close schools, to cut off funding, and to take other retributive measures against blacks through the educational system.

25. The members of the Commission--Albertis S. Harrison, Jr., Albert V. Bryan, Jr., George Cochran, Ted Dalton, Lewis F. Powell, Colgate Darden,

Hardy Cross Dillard, Alexander Harman, Jr., Oliver W. Hill, J. Sloan Kuykendall, and Davis Paschall--rid the State's eduational system of the racial overtones and prejudices that previously consumed it. The decision to preserve to the legislature the authority to determine how school board members should be selected was not a racial issue. The members of the Commission were familiar with the 1901-02 Constitutional Conention debates on school board selection. (Testimony of A.E. Dick Howard). A reformation of the selection process was not a piece of the puzzle necessary for putting together a [sic] educational system dedicated to guaranteeing all children a quality education, and the Commission did not make changes it felt were unnecessary because it wished to avoid creating centers of opposition to

ratification of the constitution.

26. Moreover, in debates among members of the General Assembly considering ratification of the constitution, there is no evidence that the means of selecting school boards was tainted by racial considerations. Members simply could not agree on which method was the best and put the debate off to another day by agreeing to preserve the flexibility that currently existed.

27. There was no discriminatory purpose in the consideration and adoption of the 1971 Constitution of Virginia. To the contrary, the Constitutional Revision Commission and the Constitution it produced worked to destroy the tools with which localities were able to racially discriminate through the public schools.

28. The selection system has also been modified since 1970. In 1970,

counties that use school board election commissions (Va. Code Section 221.1-34) were granted authority to change to a system, if the populace voting by referendum agreed, where the elected governing body appoints the school board members. Va. Code Section 22.1-41, et seq., Acts (1970), Ch. 126, 1976. In 1971, the General Assembly authorized all counties to create at-large school board seats. The evidence at trial suggested that these seats are often occupied by black members of school boards. The General Assembly also added in 1980 a provision that allows a county to return to the use of using school board election commissions. Va. Code Section 22.1-45. A 1985 amendment requires that a public hearing be held "to receive the views of citizens within the school division" on school board members who may be appointed

by the county Board of Supervisors, Va. Code Section 22.1-29.1 (1985), and a 1987 amendment prohibits the appointment of anyone to the school board whose name had not been considered at a public hearing. Acts (1987), Ch. 430, 558.

29. Since 1973, there have been several bills to change school board membership to an elective office.1/ The

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1 The General Assembly has considered bills to change the selection process in 1973 (H.B. 1385 and H.B. 1802, dealing only with Arlington County), 1974 (S.B. 249, H.B. 481, H. B. 615 and H. B. 1028); 1975 (H.B. 1028 and 1135); 1976 (H.B. 29, H.B. 38, H.B. 495, S.B. 37, and S.B. 38); 1977 (H.B. 2059), 1978 (H.B. 112, H.B. 300, H.B. 517, H.B. 749, H.B. 1085, and S.B. 263), 1979 (S.B. 640, H.B. 752, H.B. 1583, H. B. 1709, and H.B. 1805), 1980 (H.B. 147, H.B. 269, H.B. 366, and H.B. 841), 1982 (H.B. 534, H.B. 633, H.B. 866), 1983 (H.B. 112 and H.B. 722), 1984 (H.B. 5, H.B. 105, H.B.480, and H.B. 593), 1985 (H.B. 1015 H.B. 1342, H.B. 1344, H.B. 1649, and H.B. 1716), 1986 (H.B. 123 and H.B. 191), and in 1987 (H.B. 991 and H.B. 1135). (Pl. Exh. 34). The General Assembly has also commissioned two legislative studies to review whether some or all school board members should be popularly elected. H.

discussion of these bills has been free from any racial considerations.

30. In 1984, the Subcommittee studying School Board Selection (H.R. 12) released a report discussing the arguments for and against the appointment of members of the school board. The report presents legitimate, non-racial reasons for appointing school board members: highly qualified citizens serve on boards who would not be willing to serve if forced to run for public office, an appointive system engenders experience and continuity, and single issue campaigns are more likely avoided with appointive school boards.

31. Black participation on Virginia's school boards has increased over the last 28 years. There were few

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Res. No. 12, 1984 Va. Acts 2270; S.J. Res. No. 135, 1979 Va. Acts 1380.

blacks on Virginia's school boards in 1970. In 1975 and 1981, blacks composed 12% of all school board members statewide. In 1985, the percentage had risen to 15.9%, and in 1986 and 1987, the percentage of blacks on Virginia's school boards was 18%.

32. The percentage of blacks of voting age in Virginia as compared to all Virginians of voting age is 18%.

33. A comparison of the racial composition of school board membership and the population at large for jurisdictions using the SBSC and appointments by local governing bodies yields the same degree of proportionality. Blacks comprise 17.28% of the population in jurisdictions which appoint school board members through the SBSC, and school boards in these jurisdictions are 17.08% black. Blacks comprise 17.23% of the

population in jurisdictions in which the school board is appointed by the local governing body. School boards which employ this method are 18.17% black.

34. In 30 of 137 districts, blacks are "underrepresented." (Pl. Exhs. 3 and 6). Blacks are also "overrepresented" in 21 school districts. (Pl. Exh. 1). "Overrepresentation" is defined to mean that the percentage of blacks on a local school board exceeds the percentage of blacks in the locality's population by more than 10 percentage points. In 8 of these 21 localities, however, the black population is so small that a single black on the school board results in overrepresentaton. (Pl. Exh. 1).

35. Even in jurisdictions where blacks constitute 30% or greater of the population, the number of jurisdictions which have school boards that are either

demographically reflective of their population or have greater black participation is equal to the number of jurisdictions that are underrepresented. (Compare Pl. Exh. 1 and Pl. Exh. 8).

36. The degree of similarity between the racial composition of the population at large and the composition of the school board is present to a lesser degree in named defendant localities. Buckingham County's population is 42% black, but its school board is only 14.2% black. The population of Halifax County is 40% black but the only [sic] 22.2% of its school board members are black. In Nottoway County, blacks compose 37% of the population, and the school board is 20% black. The City of Petersburg's population is 61% black, and the school board is 44.4% black. In Prince Edward

county 37% of the population is black, and blacks constitute 25% of the school board.

37. The plaintiffs also claim that there are other limits to their participation in the selection of and participation on local school boards that are not reflected in the statistical evidence. Black citizens and black community organizations have actively campaigned for the selection of representatives of their choice, but black candidates without support in the black community have been appointed to fill school board vacancies. (Testimony of Hermanze Fauntleroy, Charles White (by deposition), Chris Smith).

38. The plaintiffs note in support of this contention that 71.92% of all blacks appointed to school boards are appointed in "limited access

Jurisdictions," jurisdictions where the school board members are appointed by selection commissions, a local governing body with no black members, or a local governing body where blacks are not represented in numbers proportionate to the demographic composition of the local community.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. Sections 1331, 1343, 1344, 2201 and 2202. This suit is authorized by 42 U.S.C. Section 1973J(f) and 1983.

2. Pending before this Court are the plaintiff's motion for certification of plaintiff and defendant classes and the plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the voting Rights Act, 42

U.S.C. Section 1973.

3. Rule 23(a) of the Federal Rules of Civil Procedure requires that:

> (1) the class is so numerous the joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

4. The plaintiffs claim to represent "all black citizens of the Commonwealth of Virginia." Since at the time of the 1980 Census, there were 1,008,665 blacks residing in Virginia, 1980 Census of Population, General Social & Economic Characteristics of Virginia, p. 48-21, the numerosity requirement is met.

5. Questions of law and fact pertinent to the named plaintiffs and the class they wish to represent are common

only to a limited extent, however. The plaintiffs claim that the statutory scheme requiring the appointment of local school board members was enacted and has been maintained for the purpose and with the effect of denying the plaintiffs the right to vote and to participate fully in the political process on account of their race. The analysis of the intent of the General Assembly in choosing an appointive scheme rather than an elective one is common to all plaintiffs, but the effects of that decision are not. In some counties or municipalities where there is a small black population, blacks do not suffer from any meaningful underrepresentation. Similarly, there are a few localities with significant black populations that enjoy equal or greater representation on school boards than the population figures suggest. See, e.g.,

Charles City County, Greenville, Emporia, and the City of Richmond. Additionally, various means are used on the local level to identify prospective school board members. These local idiosyncrasies may cure the deficiencies, if any, in the statutory scheme as it is applied. The Supreme Court emphasized that plaintiffs seeking class certification must not only show that they have been discriminated against, but must demonstrate "the existence of a class of persons who have suffered the same injury as those individuals." Grand Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982). The plaintiffs' allegations here are imprecise. They cannot prove that every black resident has been denied an equal opportunity to participate on school boards because of the way in which the appointive scheme has been applied in

every school district in Virginia. They do not allege as much, and cannot prove as much.

6. The plaintiffs can show they share common issues of law and fact with other blacks living in the same county, but they cannot demonstrate this commonality with blacks living in an unnamed jurisdiction. Consequently, the plaintiffs have failed to demonstrate the requisite commonality of issues and typicality of claims necessary for the certification of a class of plaintiffs. The plaintiffs' request for class certification is therefore denied.

7. The request to certify the defendants as a class suffers from similar deficiencies. There are many Virginia counties where blacks do not comprise a significant percentage of the population--e.g. Carroll County, Buchanan

County, Fredrick County and Highland County. There are other school districts where the plaintiffs cannot claim they are underrepresented. Hence, accounting for all districts where the plaintiffs may claim that the effect of the appointive process results in underrepresentation of blacks, the requested defendant class may suffer from lack of numerosity. Moreover, the details of the appointive process, such as how nominations are received or solicited, are determined autonomously at the local level. The factual questions concerning the level of participation of blacks in the appointive process and the circumstances of black participation, or lack of it, varies from locality to locality. See Stastny v. Southern Bell Telephone & Telegraph, Co., 628 F.2d 267, 277-78 (4th Cir. 1980). Therefore, the plaintiffs' motion for

certification of a class of defendants is denied.

8. The United States Constitution does not require that members of local school boards be elected. See Sailors v. Kent Board of Education, 387 U.S. 105, 108 (1967). An appointive system of selecting political officials does not impose inherent barriers to the service of minority citizens in such offices or the participation of minority citizens in the appointment process. See Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 12 (1982).

9. The Fourteenth Amendment prohibits intentional invidious racial discrimination. Washington v. Davis, 426 U.S. 229 (1976). Although the plaintiffs do not have a constitutional right to be appointed to local school boards, they do have a right to be considered for public

service on an equal basis with whites. They claim that the appointive system cannot give them an equal opportunity for appointment because of its original discriminatory purpose. The Court stated in its earlier opinion resolving the parties' cross-motions for summary judgment that if the plaintiffs demonstrated that the appointive system was originally created and maintained with the intent of depriving blacks of a meaningful input into the school board selection process, the burden of proof would switch to the State and counties to prove that the current system has not been perpetuated to intentionally discriminate against blacks. Once proven, it would be incumbent upon the plaintiffs to show that the statutory scheme continues to have a present day discriminatory impact. Memorandum Opinion at 20-28.

10. The plaintiffs' burden under the Fifteenth Amendment is similar. They must demonstrate that the defendants have denied them an opportunity to vote based upon intentional racial discrimination, and, if done so in 1870 or 1902, that the current effects of the school board selection process work to deny them equal access to the political process. See City of Mobile v. Bolden, 446 U.S. 55, 65 (1980); Lane v. Wilson, 307 U.S. 268 (1939).

11. The plaintiffs have failed to demonstrate that racial considerations played a role in the 1870 General Assembly's decision to make school trustees appointive rather than elective offices. Similarly, the evidence does not demonstrate that the appointive scheme was maintained through the last decades of the nineteenth century for racially

discriminatory reasons. Although the appointive process switched back and forth between centralization in the General Assembly and appointment by local bodies, these changes in the appointive process are not readily identifiable with a racially discriminatory policy. If centralizing the appointment powers in the General Assembly was to enhance that body's power to discriminate, as the plaintiffs contend, one would have expected Readjuster Governor Cameron to veto such a bill. He did not.

12. Race was a "substantial" or "motivating" factor, Hunter v. Underwood, 471 U.S. 222, 228 (1985), however, behind the 1901-02 Constitutional Convention's decision to retain an appointive system. Several members of the Convention cast the decision in racial tones, and the plain purpose of the convention was to

disenfranchise as many impoverished people, including most blacks, as the delegates could. See Harman v. Forssenius, 380 U.S. 528, 543 (1968). The appointive system was maintained, therefore for constitutionally impermissible reasons in 1902.

13. The plaintiffs have not proven, however, that the 1903 General Assembly modification and retention of the appointive scheme was done for racially discriminatory reasons. Although the act was passed at a time when a white supremacy movement was sweeping the post-Reconstruction south, there is nothing in the record to suggest that the decision to continue to appoint school trustees was tainted by this racial animus. In fact, if the 1903 General Assembly had changed the selection process to an elective system, it would have completely

excluded blacks from school board participation.2/ Blacks had been disenfranchised in 1903. The decision to preserve the appointive system worked no greater evil than changing the system.

14. Similarly, the General Assembly's failure to heed the advice of study groups in the 1920's and 1930's that recommended a change to elected school board members does not rise to a constitutional injury.

15. In 1947, the General Assembly

---

2 Some delegates to [the] 1902 Constitutional Convention, such as J.L. Thornton, apparently endorsed the idea of elective school boards for precisely this reason. Thornton withdrew his support for elected school boards when the convention considered the issue of school boards before deciding the issue of franchise. He stated: "I wish to state that ... I voted in committee to elect the school trustees, but I did so with the understanding at the time that the matter would not be passed upon in Convention until the question of franchise had been settled and disposed of." Debates, at 1828.

allowed Arlington County to elect its school board. The adoption of a scheme whereby some localities elected and others appointed their school board members is constitutionally permissible. Revocation of that scheme for racially discriminatory reasons is impermissible, however. In 1956, when the General Assembly revoked Arlington County's ability to elect its school board members, the Assembly did so to impede Arlington's ability to comply with court ordered desegregation. This action created a cause of action unique to Arlington. No other county, including the named defendants, was affected by that decision, nor were the named plaintiffs affected by this intentional racially discriminatory act.

16. No evidence in the record suggests that the consideration given

various bills which proposed changing to elective school boards has turned upon racial grounds. The 1984 report of the subcommittee studying School Board Selection (H.R. 12) presents legitimate non-discriminatory reasons for the maintenance of appointed school boards.

17. The most the plaintiffs have proven by a preponderance of the evidence is that the 1901-02 Constitutional Convention maintained the appointive system for racially discriminatory reasons. With the exception of Arlington County in 1956, no other acts by the state, county or city defendants suggest that the system has been maintained to limit black participation. Therefore, the plaintiffs have not demonstrated that the appointive system is presently maintained for racially discriminatory reasons.

18. Even if this Court were to find

that the appointive system was conceived and maintained until 1971 for the purpose of limiting black participation in the selection of and participation on school boards, the plaintiffs' Equal Protection and Fifteenth Amendment claims would still fail. The state has carried its burden of proof in demonstrating that at least since 1971 the system has not been maintained for racially discriminatory reasons. The Constitutional Revision Commission addressed directly the policies of massive resistance and purged them from the educational system. Article VII of the Constitution affirms this commitment. The 1984 legislative study also presents legitimate non-discriminatory reasons for preserving appointive boards.

19. The plaintiffs have failed to prove that the appointive system has

adversely affected black participation on either a statewide or local basis in the named defendant localities. Since efforts to purge Virginia's public educational system of racial discrimination began in 1970, black participation on school boards has steadily risen. On a statewide basis, blacks comprised approximately 18% of the voting population and approximately 18% of all school board members statewide. This congruency is preserved where school boards are selected by selection commissions and where they are appointed by local governing bodies. Conversely, in Hunter v. Underwood, 471 U.S. 222 (1985) and Searcy v. Williams, 656 F.2d 1003 (5th Cir. 1981), aff'd sub nom, Hightower v. Searcy, 455 U.S. 984 (1982), where the courts struck down laws conceived with discriminatory intent, those laws

continued to have a present day disparate impact upon blacks. That is not the case here.

20. Because the plaintiffs have failed to demonstrate by a preponderance of the evidence that the system for appointing school board members was conceived or is presently maintained for the purpose of limiting blacks' participation in the selection of school board members and participation on such boards, and have not demonstrated that the law results in a present discriminatory impact, the plaintiffs' Fourteenth Amendment claim fails.

21. Similarly, since the defendants did not act to deny blacks the right to vote for school board members for racially discriminatory reasons, the plaintiffs' Fifteenth Amendment claim is unsuccessful.

22. The effect of the appointive system may be more detrimental on the local level in counties such as Buckingham and Halifax where there is a significant disparity between the percentage of blacks in the population and the racial composition of the school board. From this statistical evidence, the court may infer intent to racially discriminate in the application of the appointive process in these counties. See Mayor of Philadelphia v. Education Equality League, 415 U.S. 605, 620 (1974). The plaintiffs, however, have not demonstrated that the appointive system is responsible for this disparity. The testimony adduced at trial and in the depositions submitted into evidence suggests that although blacks comprise a large portion of the population, they are not seeking school board seats in numbers

consistent with their percentage of population. The parties stipulated that since December 27, 1971, every black who has formally requested appointment by the Buckingham County School Trustee Electoral Board has been appointed to the school board. (Stipulations with Buckingham County, Stipulation 6). In Halifax County, blacks have not been appointed for reasons unrelated to the appointive system. For example, William Coleman nominated a black for a school board seat. The candidate withdrew and a white was nominated and appointed in his stead. In the other named jurisdictions --Nottoway County, Prince Edward County, and the City of Petersburg, the plaintiffs have similarly failed to demonstrate that the disparity between black representation on school boards and their percentage of the population

results from the appointive process. In these localities, the disparity would be cured by a change in one seat on the school board. The plaintiffs have failed to demonstrate that the appointive process hinders them in gaining one more seat on these school boards.

23. Under section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973 (1986) the plaintiffs must demonstrate that the proscription of a "voting qualification or prerequisite to voting or standard, practice or procedure...which results in a denial or abridgment of the right of any citizen... to vote" was motivated by race. To establish their claim under section 2, the plaintiffs need only prove that the statute relating to voting has a discriminatory effect; discriminatory purpose need not be proved. Thornburg v.

Gingles, 478 U.S. 30 (1986).

24. The Voting Rights Act seeks to purge the political process of all means employed to diminish minority voting power, specifically including "shifts from elective to appointive office." H. Rept. 97-227, 97th Cong., 2d Sess. 18 (1982).

25. Section 2 of the Voting Rights Act is applicable to statutes predating the enactment of the Act. Each instance of the continuing operation of the appointive process is a new or continuing violation of Section 2 if the effects of the decision are currently felt by the black population. See Summary Judgment Memorandum Opinion at 16-17.

26. Only Arlington County could have a claim under the Voting Rights Act since it is the only jurisdiction which could have chosen to elect its school

board members. Since no resident of Arlington is a plaintiff in this suit, that cause of action is not before the court. Moreover, any injustice resulting from the General Assembly's act has probably passed. As noted earlier, the plaintiffs have failed to prove that the appointive system has a discriminatory impact on blacks on a statewide or local level. Consequently, even if section 2 of the Voting Rights Act was construed broadly to encompass the claims of the plaintiffs in this action, that cause of action would fail. The appointive scheme does not have a present discriminatory effect upon blacks.

27. The plaintiffs' requests for injunctive and declaratory relief are denied. Judgment is entered for the defendants and against the plaintiffs, and this action is dismissed with

prejudice.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law to all counsel of record.

Aug. 18. 1988
DATE

s/Richard L. Williams
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2919

DARIUS IRBY; et al.,

Plaintiffs-Appellants

v.

VIRGINIA STATE BOARD OF ELECTIONS; etc., et al.

Defendants-Appellees

and

ROBERT P. LAWLER, in his official capacity as a member of the Board of Supervisors of Halifax County

Defendant

On Petition for Rehearing
With Suggestion for Rehearing In Banc

January 9, 1990

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. The

petition is deemed timely filed as of 12/11/89; however, as no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court,

John M. Greacen
CLERK

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

Amendment 13, Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment 14, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 15, Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973, Pub. L. 97-205, Sec. 3, June 29, 1982, 96 Stat. 134.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in

a denial or abridgement of the right of any citizen of the United States to vote on account or race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the politial process and to elect representatives of their choice. The extent to which members of a

protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Acts of Virginia, 1956, Chapter 591. An Act to repeal Sections 22-84 through 22.88.1 of the Code of Virginia, relating to election of members of school boards in certain counties; and to amend the Code of Virginia by adding sections numbered 22.83.1 and 22.83.2, relating to method of selection of school boards in such counties and cities.

Approved March 31. 1956

Be it enacted by the General Assembly of Virginia:

1. That Sections 22-84 through

22.88.1 of the Code of Virginia are repealed.

2. That the Code of Virginia be amended by adding sections numbered 22.83.1 and 22.83.2 as follows:

Section 22.83.1. Notwithstanding any other provision of law the school board of any county operating under Chapter 12 of Title 15 of the Code shall be chosen as hereinafter set out. As the terms of the members of such school board in office on the day this section becomes effective successively expire, their successors shall be chosen by the governing body of any such county for terms of four years; provided that such county governing body shall have the power to fill vacancies occurring other than by expiration of term

for the unexpired term.

Section 22. 83.2. Notwithstanding any other provision of law, general or special, no school board shall be elected by popular vote in and for any county or city.

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No. 89-1612

FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

DARIUS IRBY, *et al.*,

Petitioners,

v.

VIRGINIA STATE BOARD OF ELECTIONS,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state mandated system of appointing local school board members violates the Equal Protection Clause where that system presently serves legitimate governmental purposes and has no disparate impact on minorities.

2. Whether the maintenance of an appointive system of local school board members violates § 2 of the Voting Rights Act where state law has never permitted election of school board members in the defendant jurisdictions and where there is no evidence to suggest that selection by popular election would increase minority membership on school boards.

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STATEMENT OF THE CASE

The individual petitioners herein are black Virginia citizens who reside either in the counties of Nottoway, Prince Edward, Buckingham or Halifax, or in the City of Petersburg. The organizational plaintiffs are Citizens for a Better America and the Virginia Unit of the Southern Christian Leadership Conference, both of which assert that their members (who are mostly black) are aggrieved by the Virginia system of appointing local school boards.

Respondents are those Virginia officials responsible for the selection of school board members in their respective jurisdictions – members of the School Board Selection Commissions of Nottoway and Buckingham Counties, members of the Boards of Supervisors of Prince Edward and Halifax Counties, members of the City Council of Petersburg, and members of the Electoral Boards of each of the named jurisdictions, as well as Susan H. Fitz-Hugh, Secretary of the State Board of Elections.

Petitioners alleged in their suit that Virginia's unique statewide system of appointing, rather than electing, school board members violates their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

The origin of the Virginia system of appointing school board members dates back to 1870 when the Virginia General Assembly enacted the Public Free School Law, which provided for the appointment of school trustees by the State Board of Election (App. 111).[1]

---

[1] References to the Petitioners' Appendix will be made as "(App. ___)."

As the trial court found, there is no evidence to suggest that the original decision to appoint rather than to elect school boards was racially motivated. That choice was made during the Reconstruction Era; not until 1874 were there concerted efforts in Virginia to exclude blacks from participation in the political process (App. 112).

By the time of the 1901-1902 Virginia Constitutional Convention, the tradition of appointing school boards state-wide was well established. At that Convention, a proposal was made to change to an elective system, but it was rejected to prevent poor whites and blacks from participating in the selection process (App. 116).

In 1947, the Virginia General Assembly permitted Arlington County to elect its school board – the only exception to the mandated appointive system ever approved. That exception was eliminated in 1956 during the state's program of massive resistance to school desegregation to punish Arlington County's school board for agreeing to school desegregation (App. 119).

In 1971, Virginia adopted a new Constitution which retained the appointive system. As petitioners concede, one of the purposes of the constitutional revision was to "close the door on the era of massive resistance to school integration" (App. 9). The trial court found no evidence that the decision to retain the appointive method of school board selection in the 1971 Constitution was tainted by racial considerations (App. 123).

Moreover, in 1984 the Virginia General Assembly commissioned a study to evaluate the merits of the existing appointive system as compared to an elective system. That study concluded that there were legitimate, non-

racial reasons for maintaining an appointive system (App. 126).[2] Furthermore, there is no evidence in the record to suggest that the consistent rejection of legislation to permit popular election of school boards since 1971 was tainted by considerations of race.

Black membership on Virginia school boards has steadily increased since 1970, when there were few black members. In 1975, blacks comprised 12 percent of all school board members statewide. That percentage rose to 15.9 in 1985 and to 18 in 1987 (App. 127), the latter percentage being the same as that of blacks of voting age in Virginia at the time of trial (*Id.*). During the 1980's, the General Assembly modified the appointive system by increasing public participation in the process (App. 124-25).

Both lower courts found petitioners' claims to be meritless. The trial court's ruling followed a bench trial and is supported by extensive findings of fact and conclusions of law (App. 104-153). The appellate court unanimously affirmed the trial court in all respects. A petition for rehearing and suggestion for rehearing *in banc* were denied.

SUMMARY OF ARGUMENT

This petition is without merit in large part because it is based primarily upon the false premises that

[2] Such as encouraging the participation of qualified citizens who would not participate in a political campaign, enhancing experience and continuity on school boards, etc. (App. 10-11).

petitioners proved that the Virginia appointive system for school boards was adopted and is currently maintained for racially discriminatory reasons. The lower courts held that the origin of appointed school boards in Virginia was not tainted by racial considerations. While there was evidence from the 1901-02 Constitutional Convention that the system was then continued, in part, as a means of keeping blacks out of the political process, Virginia is no longer operating under the 1901-02 Constitution and respondents proved that the system is currently maintained for legitimate, non-racial reasons.

To establish a violation of the Equal Protection Clause, petitioners had the burden of proving that the appointive system is maintained for discriminatory purposes *and* has a disparate impact upon black citizens. Petitioners proved neither, requiring the dismissal of their complaint after a full trial.

In addition, Virginia's choice of an appointive system over an elective system does not implicate § 2 of the Voting Rights Act. The Act does not apply to appointive offices and none of the defendant jurisdictions has ever permitted popular election of school board members. Furthermore, regardless of the applicability of the Voting Rights Act, petitioners failed to prove that the appointive system has a statewide disparate impact on black citizens, that it has a statistically significant impact on black citizens in the individual defendant jurisdictions, or that the implementation of a popularly elected system would increase black membership on school boards.

ARGUMENT

I. The Virginia Appointive System for Local School Board Members Does Not Violate the Constitution

A. The System Originated and is Currently Maintained for Legitimate Reasons Unrelated to Racial Considerations

Much of petitioners' brief is based upon the false premise that the Virginia system of appointing school boards was adopted and is currently maintained for racially discriminatory reasons. The lower courts rejected these contentions.

The Virginia tradition of appointing, rather than electing, school boards dates to 1870 during the Reconstruction Era, prior to systematic attempts to exclude black citizens from the political process. While the 1901-1902 Constitutional Convention rejected a proposal to elect school boards, that decision represented an effort to exclude *both* poor whites and blacks (App. 116).

Despite the racial taint of the decision to reject popular elections of school boards in the 1901-1902 Constitutional Convention and the legislative withdrawal of enabling legislation allowing for popular election of school boards in Arlington County, at least after 1971 the appointive system was continued for legitimate, nonracial reasons. This was the trial court's explicit ruling (App. 145), which was specifically considered and affirmed by the appellate court (App. 17-18). Furthermore, the trial court found that "[t]here is no evidence, direct or circumstantial, that the original decision to make school boards appointive rather than elective was motivated by racial discrimination" (App. 112). Yet petitioners argue

that the lower courts found that the appointive system was "adopted for invidiously discriminatory reasons" (Petitioners' Brief at 23).

Petitioners' error in asserting that the record shows that the appointive system was adopted to discriminate against blacks is compounded by their misinterpretation of the lower courts' opinions. They argue that because they have shown that the appointive system was tainted by improper racial considerations, the burden of proof (for purposes of Equal Protection analysis[3]) shifts to respondents to prove by a preponderance of the evidence that the system would have been adopted in the absence of racial considerations (Petitioners' Brief at 25), citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).[4] Petitioners erroneously assert that the lower courts failed to engage in that burden-shifting for purposes of analyzing the constitutional challenge.

The burden of proof did not shift to respondents under *Mt. Healthy* because petitioners did not meet their

---

[3] Petitioners have apparently abandoned their First Amendment theory, which was rejected by the trial court prior to trial in granting partial summary judgment to defendants (App. 54-55).

[4] Plaintiffs frequently cite *Mt. Healthy City School District v. Doyle*, 429 U.S 274 (1977), as stating the appropriate equal protection analysis. *Mt. Healthy* properly states the equal protection analysis with respect to a *contemporaneous employment* decision that may have been improperly motivated. The facts of *Mt. Healthy* are significantly different from the challenged system in this case where the challenge is based upon a *noncontemporaneous* incident involving improper purpose and where there is no evidence that the system is currently being maintained for any improper purpose.

initial burden of proving that the appointive system was conceived and maintained for purposes of limiting black participation. Nevertheless, giving petitioners the benefit of any doubt whether they had cleared this initial hurdle, the trial court further found that *even if* the burden of proof had shifted to respondents, they produced evidence to satisfy that burden:

> The state has carried its burden of proof in demonstrating that at least since 1971, the system has not been maintained for racially discriminatory reasons. The Constitutional Revision Commission addressed directly the policies of massive resistance and purged them from the educational system. Article VII of the [1971 Virginia] Constitution affirms this commitment. The 1984 legislative study also presents legitimate non-discriminating reasons for preserving appointive boards.

(App. 145). On appeal, the Fourth Circuit similarly held that it was unnecessary to decide whether petitioners are correct in their analysis of burden-shifting for purposes of evaluating their constitutional claims, because respondents successfully met any such burden. Concurring with the trial court's view of the evidence, the appellate court agreed that respondents "proved that racial discrimination no longer motivates Virginia's decision to retain an appointive system for selecting school board members" (App. 14).

B. Petitioners' Equal Protection Analysis is Flawed

Petitioners not only overlook the fact that the lower courts rejected their constitutional claims using

petitioners' burden-shifting analysis, but also ignore the requirement that they must prove *both* discriminatory intent and disparate impact to prove an Equal Protection violation. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976). Instead, petitioners assume that the racial taint in the continuation of the appointive system in 1902 renders the system "unenforceable" (Petitioners' Brief at 21). There is no basis in law or logic for that argument.

The Supreme Court in *Hunter v. Underwood* unequivocally held that a present-day discriminatory impact is necessary to establish an Equal Protection violation. In *Hunter*, the Court found that a state constitutional provision disenfranchising persons convicted of certain crimes violated the Equal Protection Clause because of the historical discriminatory purpose underlying its enactment *and* its present-day discriminatory impact on blacks. In its opinion, the Court stated as follows:

> Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and *the section continues to this day to have that effect*. As such, it violates equal protection under *Arlington Heights*.

471 U.S. at 233 (emphasis added). *See also Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973).

Applying the appropriate Equal Protection analysis, the trial court herein found that "the plaintiffs have failed

to prove that the appointive system has adversely affected black participation on either a statewide or local basis in the named defendant localities" (App. 145-146). The constitutional analysis in this case properly ends with this finding of no discriminatory impact.

II. Virginia's Appointive System Does Not Violate § 2 of the Voting Rights Act

A. The Voting Rights Act is Inapplicable to the Appointment of Public Officials

The lower courts found it unnecessary to rule upon the applicability of the Voting Rights Act ("the Act") to appointive offices because they found petitioners failed to show a violation of the Act even if it were applicable. Nevertheless, both the trial court and the appellate court expressed doubt about the applicability of the Act to appointive offices. Section 2 of the Act, by its terms, applies only to the process of *electing* public officials. Where, as under the Virginia system of selecting local school board members, *no* citizens are permitted to vote, the Act is inapplicable. Neither the Commonwealth of Virginia as a whole nor any of the defendant jurisdictions has ever had the authority to elect school board members. Only one jurisdiction, Arlington County, has ever had authority to elect school board members and that jurisdiction is not a party to the present suit.

Those courts which have considered whether the Act applies to appointive offices have ruled it inapplicable. *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd sub. nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (the Act does not apply to a system of appointive

school boards even if the system operates to exclude blacks). *See also Dillard v. Crenshaw County*, 831 F.2d 246, 251 n.12 (11th Cir. 1987) (Act is inapplicable to appointment of state judges).

The Fourth Circuit's opinion states that "it appears more probable than not that Section 2 is not applicable to appointive offices" (App. 22-23). This dictum is correct and the lower courts could have based their rulings on the petitioners' challenge under the Act on this principle of law. Instead, the lower courts chose to presume the Act's applicability, again giving petitioners the benefit of any doubt.

B. The Virginia System of Appointing School Board Members Does Not Have a Disparate Impact Upon Black Citizens

On a statewide basis, the Virginia system of appointing school board members does not operate to exclude blacks. The percentage of black membership on school boards is the same as that of the black voting age population in the state – 18 percent (App. 26-27). There is no evidence in the record to suggest that an elective system would result in more black school board members.

Of the five individual defendant jurisdictions, the lower courts found that there was no statistically significant disparity between the percentage of blacks in the population and on school boards in Nottoway County, Prince Edward County and the City of Petersburg (App. 28-29 and 149-150). For the two remaining jurisdictions,

the courts found the apparent disparity to be unrelated to the maintenance of the appointive system.[5]

C. Petitioners Failed to Establish the Existence of an Effective Remedy as Required to State a Claim Under the Voting Rights Act

Assuming that petitioners could convince the Court that the Act is applicable to an appointive system, on this record petitioners have failed to show that there is a remedy for the alleged exclusion of blacks from meaningful participation on Virginia's school boards. Petitioners must show that a remedy is available to make a *prima facie* case for relief under the Act. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The only remedy offered by petitioners is that the federal courts set aside Virginia's appointive system and require implementation of an elective system in all local jurisdictions. Yet they presented *no* evidence that this switch would result in greater opportunities for black participation. The only relevant evidence suggests that if Virginia were to switch to elected school boards, the reasonably foreseeable result would be *fewer* blacks participating directly in school governance. Furthermore, petitioners did not allege or demonstrate that there exist

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[5] It was stipulated at trial that in Buckingham County, *every* black who had requested appointment to the school board had been appointed (App. 149). In Halifax County, the reasons for the failure to appoint blacks in numbers reflecting their representation in the population were found to be unrelated to the operation of the appointive system (*Id.*).

sufficiently large and geographically compact minorities in each jurisdiction to make majorities in single-member election districts or that there are politically cohesive minorities in each jurisdiction. *See Gingles*, 478 U.S. at 50-51.[6] Accordingly, petitioners failed to establish a *prima facie* case under § 2 of the Act, even assuming its applicability to this case.

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[6] To the contrary, the trial record demonstrates that Virginia blacks are split in their views on the merits of the appointive system.

CONCLUSION

This petition for certiorari should not be granted because it raises no issue of constitutional significance warranting review by this Court. Applying well established principles of constitutional and statutory law, the lower courts ruled petitioners' complaint meritless as a matter of fact and law. Petitioners have distorted the record and ignored the sound precedent and analysis set forth in both opinions below in their attempt to obtain review. Their petition should be denied forthwith.

Respectfully submitted,

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